THE CONSTITUTIONAL POWER OF CONGRESS OVER THE TERRITORY OF THE UNITED STATES.

"It is impossible," says Mr. Von Holst in his great work on the "Constitutional History of the United States" (Vol. I, p. 70), "to even hastily turn over the debates of Congress without being struck by a very important circumstance to be found in the history of no other constitutional state. Up to the year 1861 there were but few important laws of a general character proposed which, while under discussion, were not attacked as unconstitutional by the minority. The arguments are scarcely ever confined to the worth or worthlessness of the law itself. The opposition in an extraordinarily large number of instances starts out with the question of constitutionality. The expediency or inexpediency of the law is a secondary question and is touched upon only as a confirmation of the first decisive objection."

This "American Doctrine of Constitutional Law" constitutes the distinguishing feature in many matters of vital governmental concern between this country and the other nations of the globe. Powers which there are unquestioned when exercised by the sovereign power, here have first to meet the test of conformity to a fixed document. This fact, to which Americans have become so accustomed as no longer to regard it surprising, is strikingly illustrated in relation to the acquisition of territory by the government of the United States. The expansion of power and influence by the extension of boundaries, so eagerly sought after by most of the powers of the world, with us has repeatedly been resisted on the ground of its alleged infringement of the fundamental law rather than because of its inconsistency with public policy. Recent events, which have renewed this discussion and given it commanding interest in the public mind, have again emphasized this peculiarity of American institutions. The constitutional relation of the United States to her possessions is more frequently and more earnestly discussed than the question as to what is her best policy with reference to their control.

To consider this constitutional relation between the government of our country and her territory is the purpose of this paper. In the consideration of this subject our study will be confined almost wholly to the decisions of the United States Supreme Court as being the only really authoritative deliverances on the subject, and as indicating with most exactness the attitude which that Court would be most likely to assume in the decision of such questions as will probably arise from this source. It is not our purpose to present a digest of the cases which have been before the Court, but to discover, so far as we may be able, *the basic principles upon which the Court has proceeded* in the decision of such cases. In this way, better than in any other we believe, conclusions may be reached from which it will be possible in some measure to anticipate the future decisions of the Court upon the question of the constitutional power of the Government over the territory of the United States.

What authority is given by the Constitution to the general Government to acquire territory? What authority to govern it when acquired? What limitations are placed upon its acquisition or government? Such are the questions to which we shall seek an answer in the reports. The inquiry is not into those principles of public law common to all nations, but rather into the questions peculiar to our own Government, as to its right with respect to its own people—not to outsiders—in other words, its right under the Constitution to acquire and govern territory other than that within its boundaries at the time of the adoption of the Constitution.

And in the first place

I. Of the Power of the Government to Acquire Territory.

We do not purpose here to examine those general grounds of title which, under the law of nations, justify the expansion of territory, viz., cession, conquest, discovery, occupancy and so forth, sources of title of which the publicist treats. Practically these all reduce to the doctrine of Rob Roy—

> "The ancient rule, the good old plan,
> That those shall take who have the power,
> And those shall keep who can"—

and in these original sources of title the United States shares with the other nations. But we now turn to the Constitution to find in it the delegation to Congress of the power to acquire territory.

It may be premised first of all that there is no clause in the Constitution expressly allowing the acquisition of territory. The clause more particularly dealing with the territory of the United States than any other is the third section of Article IV. "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State." With regard to this Article, its scope and limitation, it will be necessary to inquire more in detail in a subsequent part of this paper, but at this point it is sufficient to notice that while the power "to dispose of the territory of the United States" is expressly given, no power to make acquisitions is conferred. In this one section, which on its face seems to deal specifically with the subject of the territory of the United States, provision is made only for the control and management of territory, not for its acquisition.

However, the absence from the Constitution of an express grant of so important a power as this by no means shows that the framers of the Constitution imagined it did not exist. This part of the Constitution "was introduced into the Constitution on the motion of Mr. Gouverneur Morris. In 1803 he was appealed to for information in regard to its meaning. He answered: 'I am very certain I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. . . . I knew then, as well as I do now, that all North America must at length be annexed to us. Happy indeed, if the lust for dominion stop here. It would therefore have been perfectly

utopian to oppose a paper restriction to the violence of popular sentiment in a popular government.' " (*Dred Scott* v. *Sandford*, 19 Howard, 507, 1856, quoting 3 Mor. Writ. 185.) But since no express authorization was inserted in the Constitution, this power must be found among the so-called implied powers of Congress, and it is there that the authorities have placed it.

The first acquisition of territory, the great Louisiana purchase, came during President Jefferson's first term. "As a strict constructionist he could not, and for a while he did not, consider the purchase of foreign territory as a constitutional act. But, when he thought of the evils that would follow if Louisiana remained with France, and of the blessings that would follow if Louisiana came to the United States, his common sense got the better of his narrow political scruples, and he soon found a way to escape. He would accept the treaty [of purchase], summon Congress, urge the House and Senate to perfect the purchase, and trust to the Constitution being mended so as to make the purchase legal." (McMaster's "History of the People of the United States," Vol. II, p. 628.) But the Constitution was not "mended," though the United States continued to hold Louisiana, and, so far as judicial decision was concerned, it was not until after a second purchase, that of Florida in 1819, that the question arose in the United States Supreme Court.

Professor McMaster's suggestion of the contest between President Jefferson's common sense and his political scruples, concurs with Mr. Gouverneur Morris's idea that restrictions cannot be regarded omnipotent. Notwithstanding the power of amendment given in the Constitution, a tendency certainly exists in Constitutional law to give to the cases a decision statesmanlike rather than lawyerlike—to bend rules of construction, to deflect from former decisions, and to respect the opinion of the legislature in large measure, where questions of vital national concern are at stake. Questions of this kind are almost invariably involved in the acquisition of large tracts of territory, and it is not surprising that upon the arising of the first case the Court readily finds primary powers expressly vested in the Na-

tional Government to which it can link the secondary or implied power of the acquisition of territory.

The first case to deal directly with this question is a leading case—*The American Insurance Co.* v. *Canter,* 1 Peters, 511, 1828. It arose in regard to the Florida purchase. Congress had passed an act establishing a territorial government, providing that the Territorial legislature should have legislative powers over "all rightful objects of legislation, but no law should be valid which was inconsistent with the laws and Constitution of the United States." Under the power thus conferred the Legislature of Florida passed an act erecting a court to try cases of salvage. And the question was whether such power could be delegated to the Territorial legislature in view of the clauses in the Constitution that "the judicial power" of the United States "extends to all cases of admiralty and maritime jurisdiction;" and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," it being argued that in virtue of these restrictions Congress alone could establish such a court. But the Supreme Court held that the court created by the act of the Territorial legislature was not a court of the United States, but a Territorial court erected in virtue of the power of Congress over the territory of the United States. This brought the Court to the consideration of the power to acquire territory. As to this Mr. Justice Johnson had said in the Circuit Court: "There is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits [that is, existing at the time of the adoption of the Constitution]. The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union." And Chief Justice Marshall, delivering the opinion of the Supreme Court on appeal, says: "The Constitution confers absolutely on the Government of the Union the power of making war, and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or by treaty." These three great powers—the war power, the treaty-mak-

ing power and the power to admit new States into the Union—are the three express powers to which most frequently in the decisions is linked the power to acquire territory. One other possible source we wish to consider later, but at present a more particular inquiry into these sources of the power is desirable.

A. *The Treaty-Making Power as a Source of the Power to Acquire Territory.*

This decision (*American Insurance Co.* v. *Canter*) has been affirmed a number of times and is frequently cited. We have the power to acquire territory referred time after time to the war or treaty-making power, but we find no explanation as to how acquiring territory is a means to assist in concluding a treaty or in carrying on war. The clause in the Constitution granting the implied powers, reads: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." But how, it may be asked, does the power to acquire territory aid the United States in exercising its power to make a treaty? Surely, a nation with which our Government might be treating would be more ready to keep its territory to itself at the time it makes the treaty, than to surrender it. The demand for the surrender of territory frequently constitutes an impediment to the ratification of a treaty. Instead of assigning the power to acquire territory to this source it is much more logical to regard the treaty-making power as auxiliary to it, and to hold that concluding a treaty is the means "necessary and proper for carrying into execution" the power to acquire territory.

If the treaty-making power can accomplish this it allows, by a parity of reasoning, the United States to do anything which may be effected by treaty. A guardian may contract for his ward, but his power to do so is strictly limited. Simply because he may stand for his ward in the eye of the law, does not confer on him the power to effect for his ward anything which may be the subject matter of a contract. So in a similar manner it seems only reasonable to

regard the power of the United States, as conferred by the treaty-making power, limited to such objects as are allowed by the Constitution. It will hardly be contended that the right to make a treaty extends so far as to allow such a treaty as would give a preference to the ports of Pennsylvania over those of New York. And yet that might well be the subject matter of a treaty except for the restriction in the Federal Constitution. To be sure no restriction upon the acquisition of territory is expressed, but if this power does not exist apart from the treaty-making power it is difficult to regard it as a means to facilitate the exercise of that power, and not rather as a result of the exercise of the treaty-making power. Thus Jefferson writes in regard to the Louisiana purchase: "Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power boundless. If it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution." Quoted in *Dred Scott* v. *Sandford,* 19 Howard, 512.

No doubt the treaty-making power is of broad scope and includes a vast range of objects. As the Court says in *In re Ross,* 140 U. S. 453, 1891, at page 463: "The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments." But the criticism here made is that under the American Constitution there are some "subjects of negotiation with foreign governments" which are specifically denied to the Government of the United States; others which, not being expressly given or implied from other powers, cannot be implied from the treaty-making power alone unless they can be shown to be necessary and proper to carry into execution this power. One such subject has been illustrated above, viz., the absence of power in the Federal Government to prefer the ports of one State over those of another; it is clear that the mere grant of the right to make treaties

cannot override this restriction and give such power to the general Government. So it is claimed that if the right to acquire territory is not in existence apart from the right to make treaties, it is illogical to regard it as a power implied from that express power, since it is not "necessary and proper" to aid in making a treaty, but the treaty is "necessary and proper" to acquire the territory. In other words, to use a homely phrase, such a construction "puts the cart before the horse."

B. *The War Power as a Source of the Power to Acquire Territory.*

A similar criticism may be made of the construction which refers to the war power as the express power in aid of which the power to acquire territory is said to exist. It is not denied that very often territory might be of prime importance in facilitating military operations, in the establishment of forts, arsenals, naval stations and so forth. In all these cases it is strictly logical to regard the acquisition of territory a means to aid in the exercise of the war power; but to go further and claim that the general conquest of territory and its retention by means of the exercise of the war power is *in aid of* this power meets with the same objection that we have stated above. It is the war power that is auxiliary to the power to acquire territory. It is that power which is "necessary and proper" to effectuate the other. If an implied power were one which were merely linked with some express power either as a means to its accomplishment or as a result of its exercise, our conclusion would be quite different. But under the clause granting the implied powers only such are granted as "are necessary and proper to carry into effect" the express powers; that is, only such as are auxiliary, as aid in the accomplishment of the others, not such as are effectuated by the others. In this general doctrine of the "implied powers," as we find it illustrated in numerous cases, this is the construction of the clause adhered to. And in deriving the implied powers of Congress from the various expressed ones, it is shown that the former constitute the *means* to an end—the

express power being the *end*. The construction of the war or treaty-making power, to render it the source of the power to acquire territory, reverses the natural construction and makes the implied power the *end* and the express power the *means*. It were easy to enumerate cases illustrating the usual application of the doctrine of the implied powers. Notable instances will suggest themselves to anyone. The *Legal Tender Cases* well illustrate the point for which we are contending and are typical of the uniform attitude of the Court towards the theory of the implied powers.

But it is freely admitted that in the decisions we find cases in which the power to acquire territory is referred to one or other or both of the two great powers above mentioned. We have already referred to the *American Insurance Co.* v. *Canter, supra.* This case has been repeatedly quoted, cited and discussed, and yet its statement as to the source of this power has never been dissented from. On the other hand we find it frequently reiterated.

Thus in *Stewart* v. *Kahn,* 11 Wallace, 493, 1870, at page 507, the Court says by way of illustration: "What is clearly implied in a written instrument, is as effectual as what is expressed. The war power and the treaty-making power, each carries with it authority to acquire territory. Louisiana, Florida and Alaska were acquired under the latter, and California under both." And the *American Insurance Co.* v. *Canter, supra,* is cited as authority. It will be noticed that no analysis whatever is given to show the relation between these powers. What is said, too, is quite apart from the point decided in the case—this was as to the power of Congress to regulate the period of the limitation of actions in consequence of the war.

So also in *United States, Lyon et al.* v. *Huckabee,* 16 Wallace, 414, 1872, at page 434, similar language occurs: "Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States." Here again we find no explanation as to how this power results—in fact the language used strongly supports the position we have taken. "Power to acquire," says the Court, "*by* conquest or treaty," that is, the conquest or treaty is the means to the acquisition. How, then, can the acquisition be

either necessary or proper to the carrying on of war or the negotiating of treaties? The language is easily intelligible and falls well in line with constitutional construction, if we understand the Court to mean that the power to acquire territory is vested in the Government of the United States *extra* these powers, but that they are the means by which it may be effectuated. This is a natural construction of the words of the Court, but what is said follows closely the language of our leading case, *American Insurance Co.* v. *Canter,* which it cites as authority.

Again, in a more recent case, *Mormon Church* v. *United States,* 136 U. S. 1, 1890, at page 42, Mr. Justice Bradley, delivering the opinion of the Court, says with reference to the power of Congress to legislate for the Territory of Utah in regard to the Mormons: "It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war." This reads very much like the former cases and seems to be a mere repetition of their language; but Mr. Justice Bradley goes on to say—and this is the significant part of his opinion—"The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty." Now, it seems quite accurate to regard the acquisition of territory an "incident" of the war or treaty-making power; but this is far different from regarding it a means "necessary and proper to carry into effect" these express powers; and in the last sentence we find the same language as in the decision cited just before this case, that it is "*by* war," "*by* treaty," "*by* cession," that territory is acquired, and it is worthy of note that "cession" is put with "war" and "treaty," indicating that they are all equally *means* to the attainment of the desired *end,* the acquisition of territory. We shall have occasion later to refer more at length to this language of

the Court; at present we cite it for its bearing upon the particular point we are discussing.

Other cases might be cited to the same effect. It will be noticed that in none of them is a careful analysis attempted to explain how the power to acquire territory is derived from these two great powers. It is, to use the language just above quoted, an "incident" of war or treaty, but in no case is it shown to be a means necessary or proper to carry into effect either of those powers. It is only in this latter sense that the famous test laid down by Chief Justice Marshall justifies us in deriving these implied powers from those expressly conferred. He says in the leading case on the "Implied Powers"— the case of *McCulloch* v. *Maryland,* 4 Wheaton, 316, 1819, at page 421: "Let the *end* be legitimate, let it be within the scope of the Constitution, and all *means* which are appropriate, which are plainly adapted to that *end,* which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This, then, is the contention we make, in regard to this theory which annexes the power to acquire territory to the war or treaty-making power, that it makes the former the *"end,"* and the latter the *"means,"* and thus gives us a construction which is the reverse of that authorized by the rule just cited, which rule admirably expresses the logical view in regard to implying powers in aid of those expressly conferred.

In the next place, in none of the cases cited is the source of the power to acquire territory a matter of paramount necessity to decide. The question arises, incidentally, where it arises at all—in some the language applies merely by way of illustration. It is not the immediate point for decision, and the possession of the territory for years before the case comes before the Court renders a discussion of the exact source of the power by which it was acquired unnecessary and unimportant.

And yet, though on both sides the right to acquire territory might be fully admitted, it is possible that it might become a matter of serious and vital moment to determine the precise source from which this power is derived. For example, if it could be shown that the power to acquire ter-

ritory is a means to carry into execution only one power expressly vested by the Constitution in Congress, namely, the power to admit new States into the Union, it would be at once apparent that only with this object in view could the United States acquire territory, and only as preliminary to Statehood could it hold its acquisitions in the subject condition of Territories. On the other hand, if it should be held that the power, however it may spring from this source, may also be derived elsewhere, in such case this difficulty would be obviated and it would remain an open question, so far as this objection is concerned, whether the United States Government has power to acquire territory for the purpose of holding it in the permanent condition of subject territory, in other words, of establishing colonies.

In the light of recent historical events and the questions thus arising, it appears at once that the question as to the source of the power in the United States Government by which it acquires territory may become of vast importance. In none of the cases to which we have been able to refer has the question assumed such shape as to be contested. In view, therefore, of the meagre language of the Court and the fact that the decision of the cases did not make necessary a precise solution of the question, we have felt justified in inquiring into the correctness of the position that the war and the treaty-making powers are sources of the power to acquire territory.

Our conclusions, then, on this branch of our subject are: that the language of the cases has repeatedly assigned the power to acquire territory, as a subordinate power to the war and treaty-making powers as primary powers; that this construction of the Constitution is dissimilar to that ordinarily followed in regard to the implied powers of Congress, and is at variance with the famous test laid down by Mr. Chief Justice Marshall; that the language of the cases is hardly conclusive, inasmuch as this precise question was not in issue; that the question is not merely of academic interest, but may prove of importance in respect to the scope of the power of the United States Government over acquired territory.

C. *The Power to Admit New States into the Union as a Source of the Power to Acquire Territory.*

We pass now to consider the third of the three express powers ordinarily assigned as the source of the power to acquire territory, namely, the power to admit new States into the Union. This power is expressly conferred: Article IV, section 3 of the Constitution reads: "New States may be admitted by the Congress into this Union," and then follow various limitations as to cases where it might be desired to exercise this power over territory already erected into States. But the power is clearly given, and, as to territory not already erected into States, no restriction is made, no limitation is expressed.

And yet strenuous objections have been made to its application to any territory except that actually in the possession of the United States at the time of the adoption of the Constitution. The treaty for the purchase of Louisiana contained a stipulation for the incorporation of the inhabitants into the Union as soon as might be possible and their enjoyment of all the rights, advantages and immunities of citizens of the United States. It was not long until it became apparent that the purpose of the administration was the erection of new States out of the territory so acquired. This was the first move towards the enlargement of the country since the treaty of peace with Great Britain, and occurred, of course, when the Republic was still young. When the treaty was before the Senate for ratification, it met with bitter opposition from distinguished Senators (see, for example, the speech of Senator Pickering, of Massachusetts, "Deb. of Cong.," III, p. 13. The speech of Mr. Josiah Quincy, of Massachusetts, delivered in the House of Representatives, January 14, 1811, is also worthy of reference, "American Orations," Vol. I, p. 180). The nature of the argument which bore most closely upon the constitutionality of the measure was, that the States, when they adopted the Constitution, had entered into a compact by which the scale of representation in the Senate and House of Representatives was determined; that the Constitution in providing for the admis-

sion of new States meant only such as could be formed out of the territory in the possession of the country at the time of its adoption; that the admission of each new State weakened the influence of every old State in each House of Congress; and that it had never been contemplated by the framers of the Constitution that the influence of the original States should be further weakened by the admission of new States beyond what would follow from the creation of new States out of the territory then possessed. It was claimed that to admit others would be such a breach of the fundamental agreement as would justify a secession from the Union. It was pointed out that so many new States might be admitted that the original thirteen altogether would constitute a mere minority in the Senate.

Such, it was claimed, could never have been the intention of these original thirteen when they formed this "more perfect Union." But the argument did not prevail and the treaty was ratified. It is interesting, however, to note that Mr. Gouverneur Morris, to whom as the member of the Convention who proposed the article authorizing the admission of new States we have already referred, in his correspondence about this time (1803) writes that he does not regard the admission of new States from such newly acquired territory as within the meaning of the Constitution. He says in answer to a correspondent: "I perceive I mistook the drift of your injuiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made." (*Dred Scott* v. *Sandford,* 19 Howard, 393, 1856, at page 507, quoting 3 Mor. Writ. 192.)

As has been said before, it was not until 1828 that the question reached the Supreme Court. Missouri and Louisi-

ana had by that time been admitted into the Union from the new territory. It is not surprising, then, that Mr. Justice Johnson said in the Circuit Court: "The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps *to the power of admitting new States into the Union.*" Certain it is that by this time the doubts as to the power to admit States out of territory acquired subsequent to the adoption of the Constitution had been laid at rest. The power was recognized as existing unrestrained in regard to such territory. It was a primary power, and to it naturally and logically the power of acquiring territory might be attached. Implying the power in this way coincided completely with Chief Justice Marshall's own rule as to the implication of powers, and yet that great Chief Justice, in delivering the opinion of the Court when the case was decided on appeal, did not refer to this as a source of the power to acquire territory, but assigned it to the war and treaty-making powers. But he in no way dissented from the opinion of Mr. Justice Johnson delivered at Circuit nor disapproved of it. And Justice Johnson does not dissent nor deliver a concurring opinion, though, since he was a member of the Supreme Court, he might have done so, had he thought the opinion of the Chief Justice at variance with that delivered by himself. The fact that he did not feel impelled to reiterate his own views shows, both that he did not regard the difference between the language of the Chief Justice and his own as of much importance, and that the point was not contested in the case—the right to acquire the territory being admitted, it was immaterial to what source the Court referred it. (*American Insurance Co.* v. *Canter.*)

In the famous *Dred Scott Case,* 19 Howard, 393, 1856, Mr. Chief Justice Taney, in delivering the so-called opinion of the Court, having considered the power under which the United States governs its Territories, says at page 446: "This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person

or property of a citizen of the United States, while it remains a Territory, and until it shall be admitted as one of the States of the Union. . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government, and not for the judicial; and whatever the political department of the Government shall recognize as within the limits of the United States, the judicial department is also bound to recognize." Now, it is well known that in the view of this case taken by Mr. Justice Nelson the consideration of this feature of the case was unnecessary. The decision might have been complete without any reference to the power of Congress over the Territories. But the national importance of the matters in issue and the more than careful consideration given to the discussion by the various members of the Court render the dicta of the judges of more than ordinary weight; and this language of the Chief Justice, so far as it applies to the implication of the power to acquire territory from the power to admit new States into the Union, is a clear and forcible statement of the law upon this subject. It is entirely consistent with the normal construction of the implied powers, and is sustained by the logic and reasoning of these decisions. It may well be accepted as the law, so far as it allows the derivation of the power to acquire territory from the power to admit new States into the Union.

Not that it is necessarily correct in its statement that territory is acquired to be held "not as a colony." If this

power to admit new States is the only source of the power to acquire territory this would be the logical conclusion, but if there is another source from which this power may be drawn restrictions must be found elsewhere.[1]

Since no limitations are placed in the Constitution upon the right of the Government to admit new States from territory other than that out of which States have already been erected, the auxiliary power to acquire territory for this purpose is, so far as the Constitution is concerned, unlimited. The expansion of the country under this constitutional power is fully justified, and needs no other basis for its support so long as the creating of new States is the end for which the territory is acquired. And yet in this *Dred Scott Case* Mr. Justice Curtis, dissenting, though he does not claim that territory may be acquired to be held permanently as a colony, nevertheless does not refer the power to acquire it to the power to admit new States, but refers it to the war and treaty-making powers. He says in regard to the acquisition of new territory (p. 613): "Whatever doubts may then [that is, at the time of the Louisiana purchase] have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six States formed on such territory are now in the Union. Every branch of this Government, during a period of more than fifty years, has participated in these transactions. To question their validity now is in vain." He then quotes the language of Mr. Chief Justice Marshall in *American Insurance Co.* v. *Canter, supra,* to which we have already referred, and in which this power is referred to the war and treaty-making powers.

[1] But this is not the only language of the Court implying that the erection of States is the only purpose for which territory may be acquired. In *Shively* v. *Bowlby,* 152 U. S. 1, 1894, at page 49, it is said: "And the Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States." Whether this is the sole object justifying the acquisition of territory, we do not now consider. At all events, the language of the case supports the view that it is an entirely constitutional object.

The entire absence of any reference to the power to admit new States is, under the circumstances, strange; and yet it is not easy to say just how much weight should be given to such an omission on the part of Mr. Justice Curtis. It is, however, made more apparent by the fact that in another part of his opinion, where he is not using the direct quotation (p. 611), he expresses himself in the same way.

This, then, is the result to which we are brought: That there is reason to believe that the framers of the Constitution did not contemplate the admission of new States out of territory other than that possessed at the time of the adoption of the Constitution, and that this makes against the assigning of the power to acquire territory to the power to admit new States into the Union; that though we find but little in the reports assigning the power to acquire territory to the war or treaty-making power, we find still less assigning it to the primary power to admit new States into the Union; that in the two leading cases, where it has been so assigned by certain judges, other judges have silently passed over it as a source of this power; but that upon the construction usual in reference to the implied powers it seems a more natural source from which to derive this secondary power than is either of the powers first referred to, viz., the war and treaty-making powers.

D. *The Power to Acquire Territory as a Necessary Incident of National Sovereignty.*

We revert now to the language of Mr. Justice Bradley in the case of *Mormon Church* v. *United States,* 136 U. S. 1, 1890, at page 42 (cited above, p. 20): "The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The *incidents* of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty." In this language, it seems to us, may be found, to a certain

extent, an explanation of the language used in the decisions which assign to the war and treaty-making powers the power to acquire territory, and a suggestion as to a logical basis on which to support this power other than the right of the Congress to admit new States into the Union.

Mr. Justice Bradley does not endeavor to show that the power to acquire territory is ancillary to these other great powers. He does say it is "derived" from them. But he follows this statement immediately with the phrase "the *incidents* of these powers are those of national sovereignty, and belong to all independent governments." This seems to explain his previous language in a measure, and to indicate that the meaning is that only in a sovereign, independent government are the great powers of declaring and carrying on war and concluding treaties vested, and in such a government there necessarily inheres as a result the right to take advantage of all the fruits of the exercise of these powers, among which prominently appears the acquisition of territory. This is an incident accompanying the exercise of such powers—not a means to carrying them on. It is recognized as accompanying their exercise by the other great nations of the globe, and to deny it to the Federal Government would be to strip it of that degree of power which inheres, almost of necessity, in a sovereign and independent state. "It could not have been intended by those who framed our Constitution that we should be born a cripple among the nations."

The power to acquire territory is not auxiliary to these other powers in the usual sense, but they can be vested only in a sovereignty, and the acquisition of territory is an attribute of sovereignty. That such is the import of this language we think is further shown by the last sentence: "The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty."

At first glance it might appear that this is a somewhat radical position, in view of the historical development of the Federal Government and the provision in the Constitution, so often referred to by strict constructionists, that "The powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Article X of the Amendments.) But upon closer examination, it is believed, the theory is not so alarming as may at first appear. Undoubtedly it is a means by which the powers of Congress in many lines may be readily justified, whereas to search for a single express power in every instance to which each individual implied power might be linked would be a slower and more difficult process. It may, too, lead to a freer interpretation of the Constitution; but it *applies rather to those relations of the Federal Government with the outside world* than to its relations with its constituent elements, the States.

Alexander Hamilton, in speaking of the implied powers of the Government, said: "There is also this further criterion which may materially assist the decision. Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favor of its constitutionality; and *slighter relations to any declared object may be permitted to turn the scale.*" Of course, Hamilton's views of government are well known, and Mr. Justice Bradley, too, favored by his decisions strengthening the arm of the Federal Government, but this does not impair the reasonableness and force of the thought expressed by either of them.

The greatest fears of the opponents of the Constitution, as is well known, arose from a disposition to regard the centralization of the governing power a menace to local interests. The history of almost every struggle in the Convention points clearly to this. It is scarcely necessary to call attention to the three great contests, over the scale of representation, the control of commerce and the regulation of the slave trade, as strikingly illustrative of this fact. So long as the central government could represent the States in the intercourse with the outside world without risk to the local interests of any section, it might exercise its power with little objection on the part of the States. It was the jealousy for the preservation of State power, the traditional Anglo-Saxon idea of the localization of power, that presented the greatest trouble in the establishment of the Federal Government. When, therefore, the question of the

existence of a power arises, and it is apparently a power which, if existing, will operate so as to impair State power and action, or directly affect prior rights of the citizens of these States, it might well be insisted that its existence should be clearly established. On the other hand, if the power is one which can be exercised only by the nation as a whole, if it is so exercised by all other independent governments, if it in no respect impinges on the power and authority of the State governments, there is much less reason to believe that its exercise was denied by the framers of the Constitution to the Government of the United States, and it is but reasonable to allow "slighter relations to any declared object" "to turn the scale."

Such questions will arise in the exercise of powers which can be exercised, if at all, only by the whole nation acting as a unit. The Government of the United States is a nation, and for its constituent parts is the only agency which can act as a unit in those great relations which it sustains towards the rest of the world. As was said by Mr. Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheaton, 264, 1821, at page 413: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and *for all these purposes, her government is complete; to all these objects, it is competent.* The people have declared, that in the exercise of all powers given for these objects it is supreme." To much the same effect are the expressions of Mr. Justice Bradley in the *Legal Tender Cases,* 12 Wallace, 457, 1870, at page 555: "The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and

negotiations and intercourse with other nations; all which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulation and laws." The learned judge then proceeds with an enumeration of the express powers of the Government and adds: "Such being the character of the General government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." We quote once more from his opinion, at page 554: "The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in *the government of the United States,* or in any department or office thereof. As a government it was invested with all the attributes of sovereignty."

It is this idea of the unity of the central government, and its National character, that leads to the conception of its essential sovereignty in relation to the outside nations. Just as in the study of psychology it is constantly inculcated that the mind is a unit, and the so-called faculties are only manifestations of its varying forms of activity; so, in this conception of the Federal Government, it is regarded as a single unified power created by the Constitution, whose various activities are exhibited in the exercise of fundamental powers there specifically enumerated, but which is not more completely described as a mere bundle of specified powers, than is the mind by a description of each of its separate faculties. And just as an enumeration of the so-called faculties of the mind does not adequately represent it; so, on the other hand, the powers granted to the Federal Government, considered apart and separately, do not fully describe the product when they are all welded to

form a single government. Their conjoining brings about a product different from their separate though combined existence—it results in the creation of a National Sovereignty. The analogy we have attempted to draw may be fanciful, but it seems, we think, to illustrate the present point. It may be difficult to assign a power in question to any power specifically granted, and yet, on the other hand, it may be still more difficult to conceive of a nation occupying a position of equality with the great nations of the world denied an important power of sovereignty, and that, too, not in its dealings with its own citizens, but *in its relations with the outside world.* It may be a power which results from the conjoining of the expressed powers as a necessity to national existence.

Mr. Justice Strong, delivering the opinion of the Court in the *Legal Tender Cases,* 12 Wallace, 457, 1870, at page 534, says: "It is to be observed it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of its specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred." So it is claimed the grant of the great powers may of necessity create such a political entity that other powers must be inherent in it, though these are not in strictness "necessary and proper to carry into execution" any single one of the granted powers.

As illustrating an application of this doctrine we may refer to the case of *United States* v. *Jones,* 109 U. S. 513, 1883, at page 518, where, in discussing the power of eminent domain in the United States, the Court, speaking through Mr. Justice Field, says: "The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in *Boom* v. *Patterson,* 98 U. S. 406, requires no constitutional recognition."

But the cases which best illustrate this point, and which are more closely related in reasoning to the question of the

acquisition of territory, are the cases which arose in consequence of the Federal legislation with regard to the exclusion of the Chinese from the United States. Thus in the *Chinese Exclusion Case,* 130 U. S. 581, 1888, at page 604, Mr. Justice Field, having first considered the treaties with China, comes to the discussion of the source of the power of Congress to pass the act in question. He says: "While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, *invested with powers which belong to independent nations,* the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." And after referring to some of the cases cited above, he says: "The control of local matters being left to local authorities and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country having different climates and varied interests has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." And the decision of the case, upholding the Act of Congress is based primarily upon the principle of international law granting to *sovereign* nations the right to exclude from their soil such individuals as they deem proper. Says Mr. Justice Field: "The power of exclusion of foreigners being an *incident of sovereignty* belonging to the government of the United States, as a part of those sovereign powers granted by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."

So again in the case of *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 1892, Mr. Justice Gray, delivering the opinion of the Court, says: "It is an accepted maxim of *international law* that every sovereign nation has the power *as inherent in sovereignty,* and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or

to admit them only in such cases and upon such conditions as it may seem fit to prescribe." This is quoted in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 1893, and supported by citations from various publicists: Vattel, Ortolan, Phillimore and Bar. The basis of the decision is the sovereignty in relation to foreign nations: "The United States," says the Court, "are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to control and make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States."

We have quoted thus at length from these decisions because the doctrine which they apparently declare can hardly be said to be established as a principle of constitutional construction, and the cases giving it their sanction are not numerous. However, we believe that the principles there enunciated are of great weight in reference to the power of the Government to acquire territory.

A hasty glance through the enumerated powers of Congress at once reveals how many refer to the foreign relations of the Government. These are vested in it in full and ample terms, at the same time that they are denied, in many instances, to the States either expressly or by necessary implication. The relations of this nation with foreign countries are intended to be carried on through the National Government, and so far as it acts with reference to these foreign governments, they recognize it alone, and the States are of no importance. It will not be contended that the right to acquire territory does exist elsewhere than in the Federal Government. Further, this right is a recognized attribute of sovereignty among the nations of the world. It is a power which, if exercised, does not infringe upon the rights of the States or of their inhabitants. It was a power well recognized at the time of the adoption of the Constitution. It is such a power as the Federal Government would exercise only in its dealings with foreign governments. The power of Congress in dealing with them is plenary, is ex-

clusive of the States, and includes, we believe, the power to acquire territory as an incident of national sovereignty.[2]

This, then, it seems, is the force of the language of Mr. Justice Bradley, which we quoted at the beginning of this branch of our discussion: That the grant of the great powers to Congress has, with reference to the foreign world, created a sovereignty; that in its relations with foreign nations it may exercise the powers of sovereignty recognized as inhering in the independent nations of the world; that among such powers is the power to acquire territory; that this exists, not as "necessary and proper" to carry into execution the war and treaty-making powers, but as an incident of the sovereignty which the grant of such great powers necessarily creates.

E. *The Purposes for which Territory May be Acquired.*

If we have correctly analyzed the source of the power of the United States Government to acquire territory, we are now prepared to consider for what purpose or purposes ter-

[2] It is pertinent to inquire at this point what express power in the Constitution may be pointed to as the primary power to which may be linked the secondary power to acquire territory, by discovery as in the case of Oregon, or by joint resolution of the House and Senate, as in the case of Texas and Hawaii. "Thus, in part at least, 'the title of the United States to Oregon was founded upon original discovery and actual settlement of citizens of the United States, authorized or approved by the government of the United States.' (*Shively* v. *Bowlby,* 152 U. S. 50.) . . . Texas was admitted into the Union by compact with Congress in 1845. . . . By joint resolution the Hawaiian Islands came under the sovereignty of the United States in 1898." (Mr. Justice White in *Downes* v. *Bidwell,* "Opinions Delivered in the Insular Tariff Cases," 85.) It is evidently impossible to assign these acquisitions to the war or treaty-making power. Unless, therefore, we are willing to adopt the theory that the ultimate admission of territory as States is the sole object for which it may be acquired, we find no other express power to which it may be assigned. Upon the theory however that the power to acquire territory is an ordinary incident of national sovereignty necessarily created by the grant of such great powers as are given in the Federal Constitution, we reach a satisfactory and, we believe, a correct solution. (Written after the submission of this essay to the Faculty of the Law Department of the University of Pennsylvania.)

ritory may be acquired. The comparatively frequent acquisitions of territory by the Government of the United States and the recognition of this right by all departments of the Government leave its existence undisputed. But this does not in itself meet the question whether under our constitutional form of government the power to acquire territory is limited in its exercise, or may be employed with no restrictions except those which exist in regard to the other nations of the world, and which are determined by the law of nations rather than by the fundamental law of any single government.

This latter, we believe, is the correct position. If we have correctly traced the source of the power to acquire territory, this is a necessary consequence. We reach, then, the conclusion that the United States has the full right to acquire territory, not only for the purpose of admitting new States from it, but for the purpose of establishing colonies. That the power to establish colonies is an ordinary attribute of sovereignty possessed by the members of the family of nations does not need proof. No matter what the form of government, whether monarchy or republic, this power has been exercised by the nations of the world for hundreds of years. It were a mere matter of enumeration to cite instances. Unless we are prepared to deny to the Government of the United States an equality of rank in this respect *in its relations with the powers of the world,* it too posseses this power to establish colonies as an inherent attribute of sovereignty, and as a consequence the power to acquire territory for this purpose.

A passage from the opinion of Chief Justice Taney in the *Dred Scott Case* is contradictory of this position. He says, at page 446: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way except by the admission of new States. . . But no power is given to acquire a Territory to be held and governed permanently in that character." And a little farther on he reiterates the same position when he says, speaking of the acquisition of terri-

tory: "It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority." Now just here it may be said that the power of the Federal Government "to acquire a Territory to be held and governed permanently in that character," and its power to govern such Territory "with absolute authority," are two entirely distinct questions, and the former may exist without of necessity establishing the latter. It is with the former that we are at present concerned—the latter will require our study later.[3] But considering the general position of Chief Justice Taney, it may be admitted that had this been the language of a unanimous Court with reference to the very point in issue, itself the *ratio decidendi,* it would be undoubtedly of great weight; but in view of the fact that, though the opinion of the Chief Justice is called the opinion of the Court, separate opinions are delivered by all the other judges (that of Mr. Justice Grier, however, being hardly more than a concurrence), and though a concurrence is expressed in its views by two of the Justices (Wayne and Campbell), yet they write opinions of their own in which this phase of the subject does not meet with a treatment coincident with that of the Chief Justice, the language is deprived of much of its force. Remembering, too, the history of the case, and the fact that Mr. Justice Nelson's opinion was to have been the opinion of the Court, and that many of the positions of the Chief Justice must be considered as overruled by the subsequent history of the country, it does not seem too much to claim that this language of this judge is not of controlling importance, and that if it were before the Court upon an occasion where the welfare of the country demanded a departure from its terms, would not be deemed binding.

It is interesting to note that Mr. Justice Campbell in his concurring opinion, refers to the language of Mr. Gouverneur Morris, which we have quoted above (p. 24), where he says: "I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces, and allow them no voice in our councils." And this

[3] V. post, p. 64.

language, though contrary to the views of the Chief Justice, does not receive adverse criticism from the judge who quotes it. It will be remembered that it was Mr. Gouverneur Morris who made the motion to insert the article in reference to the admission of new States into the Constitution. This article was unanimously adopted by the Convention. It is not without force, then, that we find from this source an expression favoring the legality of a colonial government by the United States. And Mr. Justice Campbell goes on to say: "The first Territorial Government of Louisiana was an imperial one, founded upon a French or Spanish model. For a time, the Governor, Judges, Legislative Council, Marshal, Secretary, and officers of the militia were appointed by the President."

The governments of our present Territories, leaving out of view for the time being our most recent acquisitions, are colonial in character. They present this difference, however, from the ordinary colony, that to them is held out the promise of future Statehood, and, as we shall find later, the power of Congress over their inhabitants is not absolutely unlimited. Otherwise, however, their status is that of a colony under the control of the Federal Government,[4] however admirable may be the exercise of that control by Congress. It is the Federal Government that passes the organic act which constitutes, as it were, the constitution of the Territory; the people of the Territory have no voice in its adoption. The President of the United States appoints the governor, who has a veto upon the legislation of the Territory, which veto may in some instances be overridden by a two-thirds vote of each of the two houses of the Terri-

[4] In view of the subject we have chosen, viz., "The Constitutional Power of Congress over the Territory of the United States," we have deemed it unnecessary to inquire into the status of the inhabitants of acquired territory. Undoubtedly, until our most recent acquisitions, the tendency was to confer citizenship upon them, but it has seemed to us that instead of entering into the technical question of the citizenship of the inhabitants of the possessions of the United States, more satisfactory and more practical results could be obtained by a study of the limitations of the power of Congress over the persons and property of these inhabitants, and at the same time the question as to their status would be (to some extent) solved.

torial legislature; but even with this power an act of Congress may be passed to supersede and render of no effect any act of the Territorial legislature whatever. The President of the United States also appoints the judges of the Supreme Court of the Territory, and a United States Marshal and United States District Attorney. The Territories have no vote in the Congress of the United States, and though the House of Representatives admits a delegate from each Territory, who has a seat in that House and who may speak upon the floor of the House, this gives him no vote, and is a privilege secured to the Territory by an act of Congress which might at any time be repealed, and is not secured by the fundamental law. (See Bryce's "American Commonwealth," Vol. I, Chapter XLVII, p. 578.) It is apparent that the form of government is colonial, and however large may be the powers of local legislation allowed to the Territories, it is power which is *allowed,* and not which exists as of right; power, too, which might be taken from the Territories and exercised by Congress.

It seems clear, then, that the question is rather as to whether the power exists in the United States to hold territory permanently as a colony, than that there is a doubt as to its power so to govern territory for a time, since such latter power has for nearly a century been exercised and acquiesced in as constitutional by all branches of the Government.

Such power, we claim, does exist and exists as a necessary incident of the national sovereignty created in virtue of the great powers expressly granted to Congress.

But a further objection frequently made to its existence is that it violates the principles fought for in the Revolution and the very theory of our governmental institutions. Admitting that these are the goal towards which all government should tend, nevertheless it cannot be admitted that the Constitution aims to secure to all parts of the domain of the United States equal rights of self-government. It has permanently deprived the District of Columbia of self-government, and in reference to the territory of the United States no provision is made obligatory as to the admission of new States. The case of *Loughborough* v. *Blake,* 5

Wheaton, 317, 1820, in which the right of Congress to tax the District of Columbia was drawn in question, though using conservative language, is clear to the effect that the Constitution did not contemplate the right of government as depending in all cases upon the right of representation. Speaking of the inhabitants of the District, Chief Justice Marshall says: "Certainly the Constitution does not consider their want of representation in Congress as exempting it from equal taxation."

Undoubtedly, it would be more consistent with American theory that all parts of the governed territory should be represented in the government. The admission of voteless representatives is, as it were, a tacit admission of this, but no means of representation is known to the Constitution except the admission of the Territory as a State, and this is frequently a solution not feasible. (See Bryce's "American Commonwealth," Vol. I, p. 587.) In such cases, where a Territory is denied Statehood, it is manifestly because the inhabitants are unfit for the new duties and responsibilities which Statehood would impose. That the Government should refuse Statehood to a community reaching the ordinary standards required is highly improbable. New conditions, race characteristics differing the people in temperament and political traditions from the Anglo-Saxon ideal, and long inexperience of self-government would undoubtedly be weighty reasons for deeming a community below the level at which Statehood is deserved. But the full power to determine whether the community has reached the point of deserving Statehood and whether Statehood shall be conferred is a political question, entrusted to Congress, which has the power to admit new States.

Chief Justice Taney says in the *Dred Scott Case* at page 447: "As the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government, and not the judicial; and whatever the political department of the Government shall recognize

as within the limits of the United States, the judicial department is also bound to recognize."

Since, then, it is a political question, and is vested in Congress for its settlement, the question of the right to hold territory permanently as a colony seems to be one which cannot directly come before the United States Supreme Court. It will not be contended that the Court could by any judicial process accomplish the admission of a Territory to Statehood. The question is one entrusted to the Congress for solution. A declaration on its part that new territory will be held permanently as a colony is exceedingly unlikely. Such a declaration would be to no purpose. All the territory could be held under the avowed purpose of creating States from it, and yet, since the time of the admission as States depends entirely upon the discretion of Congress, the colonial form of government could be continued indefinitely, with no power in existence to bring Congress to a decision as to whether the territory should be at once admitted or permanently held as a colony. We come to the conclusion, then, that though the power to hold territory permanently as a colony were not legitimately derived from the Constitution, nevertheless such power would practically exist in Congress, since it has the power to acquire territory for new States, but the additional power to determine, with unlimited discretion, when Statehood shall be conferred, and in the meantime to maintain a government colonial in character.

However, we believe that under the Constitution the power to establish colonies does exist; that it is an incident of the sovereignty necessarily created in the grant to the Government of the United States of the great powers enumerated in the Constitution; that therefore Congress has the full power to acquire territory under the law of nations, either to hold under a colonial government, or to admit new States therefrom.

Having thus reviewed the right of the Government of the United States to acquire territory, we now turn to the next branch of our subject and enter upon the study

II. Of the Power of the Government Over Territory When Acquired.

And under this second part of our discussion we take up first

A. *The Status of the Rights of the Inhabitants of Acquired Territory upon its Acquisition.*

In the present state of civilization the only source of the acquisition of territory being the transfer of territory from one nation to another, whether under the diplomacy of peace or the necessity of war, in every instance we have as a subject of the transfer a territory already peopled in which personal and proprietary rights already exist. Of course, it is entirely competent for the governments contracting, in regard to the transfer of this territory, to stipulate for the maintenance of existing rights, and such has been the usual course in the treaties by which new territory has been acquired by the United States. But apart from such stipulations, the rights of the inhabitants of ceded territory are protected under the law of nations. The ceding power can transfer only what it possesses, and that is its relation to the inhabitants as sovereign and as *ultimus haeres* of all property. Immediate proprietary rights it does not have, except in such cases as government buildings, reserved land and so forth, for it has already granted these away to the inhabitants of the territory. Hence it does not have them to cede to the acquiring power, and such power can reach them only by confiscation, an act hardly consistent with free government. Consequently in our country we find existing titles sacredly protected upon the acquisition of territory.

In one of the earliest cases upon this subject, *Soulard* v. *United States,* 4 Peters, 511, 1830, Mr. Chief Justice Marshall says: "In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been equally sacred, though it had not been inserted in

the contract. The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

The same great Chief Justice expresses more fully the principles at the basis of this doctrine in *United States* v. *Percheman,* 7 Peters, 51, 1833, at page 86: "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to an amicable cession of territory? . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

This case is a leading one, and is referred to repeatedly in subsequent cases, the very language being frequently quoted. It arose, as did the case cited immediately before it, in reference to the question of the validity of titles alleged to have had their origin before the acquisition of the terri-

tory in which the property was situated. Their doctrine has been referred to time and time again. (*Delassus* v. *United States,* 9 Peters, 117, 1835, at page 133; *Mitchel* v. *United States,* 9 Peters, 711, 1835, at page 733; *Strother* v. *Lucas,* 12 Peters, 410, 1838, at page 438; *Lessee of Pollard's Heirs* v. *Kibbe,* 14 Peters, 353, 1840, at pages 390, 406, 409, 416; *Leitensdorfer* v. *Webb,* 20 Howard, 176, 1857; *Dent* v. *Emmeger,* 14 Wallace, 308, 1871, at page 312; *Tameling* v. *United States,* 93 U. S. 644, 1876, at page 661; *Astiazaran* v. *Santa Rita Land and Mining Co.,* 148 U. S. 80, 1893, at page 81; *Ainsa* v. *New Mexico & Arizona Railroad,* 175 U. S. 76, 1899, at page 79.) In this last case the Court says: "The duty of securing such rights, and of fulfilling the obligations imposed upon the United States by the treaty, belongs to the political department; and Congress may either itself discharge that duty, or delegate its performance to a strictly judicial tribunal or to a board of commissioners. . . . Even grants which were complete at the time of the cession may be required by Congress to have their genuineness and their extent established by proceedings in a particular manner before they can be held to be valid. But where no such proceedings are expressly required the recognition of grants of this class in the treaty itself is sufficient to give them full effect."

So the determination by Congress is conclusive upon the judiciary, as well in relation to the boundary of the territory acquired, as to the extent of grants made to the inhabitants prior to acquisition; *Foster and Elam* v. *Neilson,* 2 Peters, 253, 1829, at page 306, as to the boundary of the ceded territory; *Astiazaran* v. *Santa Rita Land and Mining Co.,* 148 U. S. 80, 1893, at page 83, as to the boundary of tract claimed by the alleged grantee; in which latter case the Court says: "The action of Congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the Court, the judgment of the Court would be nugatory; and if Congress should decide the other way, its decision would control."

This question is not strictly within the limits of our sub-

ject, but it is so germane to it that it has seemed worth while to refer to it thus briefly, and to outline the general principles which are recognized by this Government in relation to the rights of the inhabitants of acquired territory. This seems of importance, first, because, before we can consider the constitutional power of the Government over the new acquisitions, we should know the existing status of legal relations, since the power of the Government must be exercised with reference to them, either allowing them to stand or altering them as it may deem fit; and, in the second place, it incidentally illustrates the attitude of the Court toward questions of this nature, discussing them under the general principles of international law, and regarding the United States Government as a sovereignty whose relations with other governments are regulated by that code. It, therefore, in an indirect way we admit, adds some weight to the stand taken in an earlier part of this paper, that the United States must, in its relations with the outside world, be deemed a sovereignty possessed of those powers which in the family of nations are considered "incidents of sovereignty."

Having attempted thus briefly to outline the general status of legal rights existing upon the acquisition of territory, our next inquiry is into the power of Congress over this territory to modify or control these existing relations, and in reference to this part of our discussion it will be convenient to consider it under the general heads of the source of this power under the Constitution, the manner of its exercise, and its limitations if any. And first

B. *Of the Source from which Congress Derives its Power to Govern the Territory of the United States*—

a very different question from that as to the source of its power to acquire territory.

"Of course," says Mr. Justice Bradley, delivering the opinion of the Court in *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 1888, at page 39, "the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have

been, undoubted"; and in 1879 Mr. Chief Justice Waite, speaking for the Court in *National Bank* v. *County of Yankton,* 101 U. S. 129, 1879, says at page 132: "It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded." Our present object is to outline briefly these differences of opinion as they appear in the decisions, with some reference to the reasoning in support of the different views.

The main question upon which divergence of views exists is whether the power to govern territory may be deduced from the third section of Article IV of the Constitution, which gives to the Congress "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The earliest case in regard to this subject is *Sere* v. *Pitot,* 6 Cranch, 332, 1810, in which Chief Justice Marshall says, at page 336: "The power of governing and legislating for a Territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power,' etc. [quoting the Article referred to above]. Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans." It is interesting to compare this language with that of the same judge in the case of the *American Insurance Co.* v. *Canter* (already referred to), 1 Peters, 511, 1828, at page 542, where he says with reference to the government of Florida: "In the meantime Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory, or other property belonging to the United States.' Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is

not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." He still states the Article as a source of this power, but there is a note of question in the other part of his language, and it cannot be regarded as an absolute assertion that this Article of the Constitution was meant to have so broad a scope. It is not improbable that this language of the Chief Justice was influenced by what Mr. Justice Johnson had said at Circuit in trying the case: "At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted in part of organized States, and in part of Territories, the absolute property and dependencies of the United States. These States, this territory and future *States* to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or *government* of territories beyond those limits." In neither of these cases was it necessary to decide as to the source of this power. They show, however, clearly enough, the views which may be taken in subsequent cases.

With reference to the power to govern as a necessary consequence of the power to acquire, there seems to be no question, and subsequent decisions will be found fully in accord with this. As to the other question, the point of difference is whether other territory than that held at the time of the adoption of the Constitution may be legitimately regarded as within the contemplation of the framers of the instrument; in other words as forming one of the objects upon which that clause of the Constitution (Article IV, section 3) was to operate.

With regard to the first position that the right to govern is a necessary consequence of the right to acquire, we may cite *Murphy* v. *Ramsey,* 114 U. S. 15, 1885, at page 44, in which Mr. Justice Matthews says: "The people of the United States, *as sovereign owners* of the National Territories, have supreme power over them and their inhabi-

tants"; *United States* v. *Kagama,* 118 U. S. 375, 1886, where Mr. Justice Miller says, at page 380: "The power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else"; *Mormon Church* v. *United States,* 136 U. S. 1, 1890, Mr. Justice Bradley, delivering the opinion of the Court, says at page 42: "It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. . . . Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident."

On the other hand, it is not difficult to find cases referring to the express language of Article IV as the source of this power. In *United States* v. *Gratiot,* 14 Peters, 526, 1840, Mr. Justice Thomson says at page 537: "The term territory, as here used [that is, in Article IV, section 3], is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest." *Cross* v. *Harrison,* 16 Howard, 164, 1853, contains language to the same effect, at page 193: "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution,

by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And a little further on the passage from *American Insurance Co.* v. *Canter,* quoted above (p. 47), is referred to. Again in *United States* v. *Guthrie,* 17 Howard, 284, 1854, at page 309, Mr. Justice McLean, in a dissenting opinion, after referring to the two sources of the power suggested by *Canter's Case,* says: "It seems to me that the power to govern a territory is a necessary consequence of the power given 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' "

Now it may be noticed in regard to these cases: First, that in none of them was the determination of the exact source of the power of Congress to govern its territory necessary to the decision of the case, hence the language of the judges is of the nature of *obiter dicta.* In the second place it will be seen that the cases referring principally to the express language of the Constitution are prior to 1856, while those which tend to regard the power to govern as a necessary consequence of the power to acquire are subsequent to that date. It was in that year that the Supreme Court handed down the *Dred Scott* decision, which is the only case containing a careful and analytical consideration of this subject. It seems clear that it was this decision which changed the trend of judicial views upon this question, and we desire to follow the line of reasoning by which the majority arrived at their conclusion, as well as the reasoning by which that conclusion was opposed.

In discussing this branch of this celebrated case, Chief Justice Taney says, at page 432: "The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States'; but in the judgment of the Court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by,

the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more." Then follows a brief summary of the history of the time preceding the adoption of the Constitution in its relation to the scope of this Article. The Chief Justice outlines the difficulties which had arisen among the States in reference to the unsettled territory included within the chartered limits of some of the States, causing much uneasiness during the war, but proving far more serious after peace was established. The States were burdened with war debt; some could turn to this unsettled territory as a resource, while others, not having any such territory within their boundaries, "saw before them many years of heavy and burdensome taxation." These latter insisted that as it had been by the joint efforts of all the States that independence had been achieved and the benefits of this territory secured, so it should be held for the benefit of all, as a common source from which might be paid the war debt.

The question developed serious proportions, and gave rise to grave fears, which, however, were "at once removed when the State of Virginia in 1784 voluntarily ceded to the United States the immense tract of country lying northwest of the river Ohio, and which was within the acknowledged limits of the State." Other cessions followed, and the dangers from this source were averted. These cessions were accepted by Congress (that is, the Congress of the Confederation), which had no right, says the Chief Justice, under the Articles of Confederation, to accept them, but did have such right, as representing independent sovereignties, to accept any transfer for their common benefit, and to make rules for such ceded territory. It was for the government of it that the famous Ordinance of 1787 was passed.

This territory belonged to the several confederated States as common property, but under the new Constitution a new *Government* was to be brought into existence, to succeed this federated Union, and "to exercise no authority beyond those expressly granted by the Constitution or

necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, it was obvious that some provision was necessary to give the new Government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their powers of sovereignty." It was for this specific purpose that the Article was required, and for this that it was inserted, and one of the first acts of the new Congress under it was to re-affirm the Ordinance of 1787.

The Chief Justice then turns to the language of the Article, and finds strong support for his view in a careful analysis of it. "It does not speak of *any* territory, nor of *Territories,* but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to *the* territory of the United States —that is, to a territory then in existence, and then known or claimed as the territory of the United States." The "other property," referred to must mean personal property, since that specified is land; and this must refer to such property, that is, ships, arms, and so forth, belonging to these sovereignties in common, for it would not have been necessary to confer such power in reference to ships it might itself build, or arms it might itself manufacture or provide for the public service.

The concluding words of the clause, in view of the condition of things at the time, and the claims of various States, clearly refer to the territory then possessed, and to that alone. The language that "nothing in the Constitution should be construed to prejudice any claims of the United States, or of any particular State," cannot in reason be applied to territory which might in future be acquired, since to it no single State could have any basis for a claim. This clause relating so clearly only to land then possessed, obviously strengthens the conclusion that the former clause is so restricted. The words, "rules and regulations" are

significant. The power is given, not as it is in reference to the District of Columbia, "to exercise exclusive legislation," etc., but language is used similar to language in other parts of the Constitution where a particular specified power is granted and not general powers of legislation. "As, for example, in the particular power to Congress 'to make rules for the government and regulation of the land and naval forces' or the particular and specific power to regulate commerce; 'to establish a uniform *rule* of naturalization; to coin money and *regulate* the value thereof.' " Considering other clauses in the Constitution, for example, the provision that debts against the old Confederation are to remain valid against the new government, or treaties concluded before the adoption of the Constitution, are to remain binding subsequent to its coming into effect, we find certain Articles the necessity for which is clearly apparent in consequence of the fact that a new Government is to be created to supplant the former "federative Union," and not to be its mere successor.

"Whether, therefore," says the Chief Justice, "we take the particular clause in question by itself, or in connection with the other provisions of the Constitution, we think it clear, that it applies only to the particular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to new territory which the new Government might afterwards obtain from a foreign nation." He concludes with a careful discussion of *Canter's Case,* showing that the decision there given is inconclusive upon this point.

None of the other justices, with the exception of Mr. Justice Curtis, considers this question at length, though it is necessarily briefly referred to in their opinions. Mr. Justice Curtis, dissenting, takes the opposite position from the Chief Justice, and analyzes his contention in detail. He says, at page 604: "In the argument of this case at the bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side it was maintained that the Consti-

tution contains no express grant of power to organize and govern what is now known to the laws of the United States as a Territory. That whatever power of this kind exists, is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government. On the other side, it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth Article of the Constitution." This language shows clearly two things: first, that the source of the power to govern the territory of the United States was fully argued and carefully considered; and second, that it was regarded as a question, the decision of which would be of effect in relation to the extent of the power of Congress over the territory.

Mr. Justice Curtis then enters upon a historical review. He points out that at the time when the Constitution was framed and adopted the cession of these lands by the various States was as yet incomplete. North Carolina ceded land in 1790, and Georgia in 1802; that hence this Article of the Constitution was prospective in its scope, as well as adapted to an existing condition of affairs. He, however, admits that there was "a confident expectation entertained by the other States" that these cessions would be made. In view, then, of land to be held in a condition other than Statehood, a necessity arises for a provision for its regulation. This removes a great deal of the force of this point, and rather adds to the contention of the other side, that the article has reference to a *definite* object.

"There was to be established," he says, "by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contem-

plated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with the language, and I can have no hesitation in rejecting it."

We have sought to do justice to the arguments given on each side. Undoubtedly in our efforts to condense, we have seriously impaired the force of each; but it seems clear that Mr. Justice Curtis does not meet the close and logical analysis of the able opinion of the eminent Chief Justice. The historical review of each corresponds very closely, but even here that of the Chief Justice is more thorough; and, in the discussion of the language of the Article, the dissenting opinion is notably weak—in fact an answer is hardly attempted to the powerful considerations referred to in the so-called opinion of the Court.

As has been said above, subsequent decisions have been inclined to disregard the express words of the fourth Article, as the source of this power, and to consider it a necessary result of the power to acquire territory. However, we can hardly regard the question as one absolutely concluded.

It has seemed worth while to consider this question, for the sake of a more nearly complete view of the subject, but more especially because the language of the Article, so often referred to, is apparently rather limiting in its grant of power to Congress, and hardly a source of such plenary authority as has since been upheld in reference to the territory of the United States. That it is significantly different from the grant of "exclusive legislation" in the District of Columbia has already been noted. Surely this difference in language is not an accident. Mr. Justice Campbell's opinion, at page 514 of this same case (*Dred Scott* v. *Sandford*), may be cited as an illustration of an elaborate argument to show the limitation of the powers of Congress, granting that they are derived from this Article.

"In the discussions in both Houses of Congress," says Mr. Justice Daniel, at page 498, "at the time of adopting this eighth section of the act of 1820 [the Missouri Compromise], great weight was given to the peculiar language of this clause, viz., *territory and other property belonging* to

the United States, as going to show that the power of disposing of and regulating, thereby vested in Congress, was restricted to a *proprietary interest in the territory or land* comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, *'territory or other property,'* identified *territory* with *property,* and inasmuch as *citizens* or *persons* could not be property, and especially were not property *belonging* to the United States. And upon every principle of reason or necessity, this power to dispose of and to regulate the *territory* of the nation could be designed to extend no further than to its preservation and appropriation to the uses of those to whom it belonged, viz.: the nation." And a little further on, at page 491, he says: "James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of Article IV of the Constitution, 'that it cannot be well extended beyond a power over the territory *as property,* and the power to make provisions needful or necessary for the government of settlers, until ripe for admission into the Union.' "

It seems clear that the language of this Article may well be regarded as limiting in a decided measure the powers of Congress over territory, as compared with what such powers may be held to include, if they are derived from the right to acquire territory. A wider construction of the Article was argued for in this case, but was not adopted, and under the view which is apparently the prevailing one at present, we cannot but come to the conclusion that the right to acquire territory, regarded as the source of the right to govern it, confers upon Congress more extensive powers than the express language of this Article.

This, then, is the result at which we arrive from these considerations: That there has been a divergence of opinion as to the source of the power of Congress to govern the territory of the United States, some regarding it as derived from the third section of the fourth Article of the Constitution, others considering it a necessary consequence of the

power to acquire territory; that at present authority tends to support the latter view; that under the construction of the Article which has received the greatest sanction, this present view of the Court gives to Congress wider power over the territory than would be possessed were the express language of the Article the sole source of this power.

To discuss the limits of this power, as thus derived from the power to acquire territory, will require our attention subsequently, but first we desire to consider briefly, as preparatory to this

C. *The General Mode of the Exercise of This Power by Congress.*

It is not intended here to enter into a view of the general organization of territorial governments, but merely to outline the manner in which the power of Congress over the territory of the United States is exercised through legislation, in order that it may more clearly appear what relation such legislation bears to the test of constitutionality. This will make possible a more systematic and more accurate study of the limitations of this legislative power.

The power of Congress may be exercised either directly or mediately. Under a general act, called the organic act, the Territory is usually organized out of the possessions of the United States, when the inhabitants thereof are sufficiently capable of limited self-government. Under such an act the three great departments, executive, legislative and judicial are kept distinct, and powers of local government are conferred. Under the "Revised Statutes of the United States of 1878," section 1851: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution of the United States. But no law shall be passed, interfering with the primary disposal of the soil. No tax shall be imposed on the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands of residents." Other restrictions may be embodied by Congress in this organic act and it then becomes the constitution, as it were, of the Territory (*National Bank* v.

County of Yankton, 101 U. S. 129, 1879, at page 133) and just as the legislation of Congress is tested by its consistency with the National Constitution, so the acts of the Territorial legislature are valid only so far as they fall within the powers conferred by the organic act. It will be noticed that under this general statute the acts of the Territorial legislature are expressly limited by the provisions of the Federal Constitution. It is important to remember this enactment in reference to the decisions with respect to the question of the competency of the Territorial governments to pass certain acts under the Federal Constitution. The Court may consider directly the justification to be found in the Constitution, but this is far from deciding the important question whether the Constitution applies immediately or only in consequence of the legislation of Congress.

This organic act, the fundamental law of the Territory, is itself subject to the question of constitutionality, but so long as it is confined to the subjects of legislation enumerated in this general enactment, its constitutionality can hardly be doubted. The delegation of power, however, has its limits. Clearly Congress may not delegate power the exercise of which is confided exclusively to itself. These powers it must itself exercise, and its power of providing the fundamental law for the government of the territory of the United States, does not authorize it to delegate to a Territorial government to be exercised thereby any of these great national powers vested in Congress. Thus we may cite the case of *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 1889. Power of legislation had been conferred upon the District of Columbia, no more restricted so far as the question in that case was concerned than the legislative power of the Territories under the general enactment cited above. The District had imposed "a license on trades, business and professions practiced or carried on in the District of Columbia" and required among other things, commercial agents, whose business it was to offer merchandise for sale by sample to pay such license. Such a tax, when applied to a commercial traveler engaged in negotiating sales between a point within and a point without the State, had been decided to be a regulation of interstate commerce within the

exclusive control of Congress. (*Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 1887.) It was held that power to impose such a tax could not be delegated to the legislative assembly of the District, under the power of Congress to exercise exclusive legislation "in all cases whatsoever," and the act of the assembly under its general power of legislation was held to be invalid when applied to such commercial agents as being beyond the power of Congress to authorize. The principle of this case is directly applicable to the Territories, and establishes the rule that in regard to those powers which under the Constitution have been entrusted to Congress for the benefit of the whole country, and are national in character, no act of Congress can constitutionally authorize their exercise by the legislative body of the Territory, or the District of Columbia. This limitation, however, upon the power of Congress, applies to its efforts to exercise its legislative control over the Territories mediately, and has no reference to its direct enactments in regard to the Territory.

Congress may, of course, instead of organizing a Territorial government, retain to itself the full control over its possessions and exercise all its authority directly, but the usual course is the organization of a Territorial government, and where this is done the ordinary affairs of the Territory are entrusted for their regulation to the enactments of the Territorial legislature. The great mass of private rights are secured in this way. But there always exists in Congress the power to alter at its will the law of the Territory upon any point, or to legislate directly in regard to any matters it may choose, subject only to such general limitations as may be found to exist with reference to its power over the territory of the United States.[5] So,

[5] So in *National Bank* v. *County of Yankton,* 101 U. S. 129, 1879, at page 133, it is said: "Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid [v. *Utter* v. *Franklin,* 172 U. S. 423, 1899], and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories, and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

if it should deem proper, it cannot be doubted but that Congress could abolish the local government of the Territory and constitute itself the legislative body for all purposes. It is therefore perfectly competent for Congress to require the acts of the Territorial legislature to be submitted to itself, and, if disapproved, to be of no effect. It is not difficult to refer to illustrations of the exercise of the direct authority of Congress over the Territories. Instances will suggest themselves. The question of polygamy is one which has given to the reports a great number of decisions in reference to the power of Congress to legislate directly for the Territories.

But whether this authority over the territory of the United States is exercised directly or mediately, *it is in all cases the power of Congress.* The Territories possess no governmental rights in themselves. The organic act, which corresponds to a State constitution, is not adopted by themselves, but is imposed upon them by the authority of Congress. The power there conferred is not alterable at the will of the Territories, but all their acts must be shown to be in conformity with these fundamental acts of Congress. Congress is in all cases the real government of the Territories, and though it has in many instances delegated this power to the Territorial legislature it is merely *delegated* power.

A point of procedure well illustrates this: in *Wallace* v. *Anderson,* 5 Wheaton, 291, 1820, Mr. Chief Justice Marshall, delivering the opinion of the Court, decided "that a writ of *quo warranto* could not be maintained except at the instance of the Government." This principle appears in a later case, directly illustrating the point we desire to make. In *Territory* v. *Lockwood,* 3 Wallace, 236, 1865, an information in the nature of a *quo warranto* had been filed in the name of the "Territory of Nebraska on relation of," etc. And it was held that such process must issue in the name of the United States. "The right to institute such proceedings is inherently in the Government of the nation." And a case several years later says: "Strictly speaking, there is no sovereignty in a Territory of the United States, but that

of the United States itself." (*Snow* v. *United States,* 18 Wallace, 321, 1873.)

Whatever form, therefore, the government may take, the United States is the governing power, and any legislative bodies, other than Congress, are mere agencies. Thus in *Snow* v. *United States,* 18 Wallace, 317, 1873, Mr. Justice Bradley, in discussing the question as to whether the attorney-general of the Territory or the district attorney of the United States was, under the facts of the case, the proper prosecuting officer, recurs to the fundamental principles in the beginning of his opinion. "The government of the Territories of the United States belongs, primarily, to Congress; and secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. It is, indeed, the practice of the Government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt."

This fact, that the acts of the Territorial legislature are in reality only a manifestation of the power of Congress, is important in this respect, because if Congress, in its legislation for the Territories, is limited by those restrictions expressed in the Constitution with reference to its power to affect individual rights, so the Territory is limited in the same respect, for Congress could delegate to its agency no right to transgress the limits placed about itself. But if Congress, in relation to the inhabitants of the territory of the United States, is not limited, as it is in relation to the inhabitants of the States, on no principle can the Territorial legislature be regarded as so limited, if sufficient authority is conferred by its organic act.

It is significant to note, here, that the general act quoted above specifically disallows any action on the part of the Territory contrary to the Constitution of the United States. Of

what use is this language, if Congress in reference to the Territories is subject to the same restrictions as in reference to its other legislation? If it is so subject, the Territory, as a matter of necessity, is likewise restrained within the same limits. (*Dred Scott* v. *Sandford,* 19 Howard, 451, 1856.) It seems clearly to indicate that, in the judgment of Congress, it is not restrained by these limitations. Of course, the opinion of Congress is by no means decisive upon such a question, but in this connection it is certainly worthy of note.

The power, then, over the territory of the United States is of but one kind, that is, the power of Congress; and however it may appear, it always must meet the first test of whether it is competent for Congress to enact such legislation. If passed by the Territory, it has still further to undergo the test of conformity to the organic act. This brings us to the conclusion that the discussion in various cases as to the power of the Territory to pass certain acts under the Constitution, and not as falling within the scope of its organic act, has direct application to the question of the power of Congress itself to pass such legislation; and the discussion of the limitations of Territorial power, flowing not from the organic act but *extra* that act, is of immediate importance as respects the limitations on Congress. The two questions constitute in reality but one, and, except that the Territorial legislation is restricted by the organic act, must be decided on the same principles. This must be constantly remembered in dealing with the cases, as otherwise it might seem that two questions are involved, and that the cases referred to are of two distinct classes. The unity of the authority over the territory of the United States, however, consolidates the cases, and makes them of direct bearing upon the single question of how far Congress is limited in its legislation with regard to the territory of the United States.

This brings us to a position where we can enter more readily into a study of this difficult question, but before we take up the cases in reference to this point, it is of importance to note

D. *The Source of the Limitations on the Power of Congress over the Territory of the United States—*

if any such exist. That the power to govern the territory of the United States is not wholly unlimited seems to be the consensus of the decisions, but with regard to the extent of the limitations a greater degree of uncertainty arises, and it is believed that it may assist in the study of this point to consider whence any existing limitations arise.

Congress possesses power to govern the territory of the United States, not as derived from the inhabitants of this territory, but from the people of the United States, who have delegated this power to Congress in the National Constitution. By the "people of the United States" is here meant the people of the States, composing the Federal Union. They alone have adopted the Constitution; the inhabitants of the territory of the United States have in no manner concurred in delegating the power to Congress. With the people of the several States resides the power of amending the Federal Constitution, and to this the inhabitants of the territory can oppose no resistance but that of persuasion and force. These overcome, there seems to be no reason why it is not within the power of the people of the several States to adopt such amendments as to place in Congress supreme and unlimited power over the territory of the United States and its inhabitants. Naturally no one expects this to be done, and doubtless it never will, but it serves to illustrate the point we desire to make; that whatever limitations of the power of Congress over the territory of the United States exist, spring from the will of the people of the States, who have adopted the Constitution, and not from the will of the people who are to be subject to this territorial power. Consequently, in considering the extent of these limitations, the inquiry must be into the scope of the limitations on the power of Congress intended by those who have adopted the Constitution as this intention is expressed in the language of the instrument. That they should desire to restrain their legislative body from interference with the primary rights of all individuals seems entirely possible, but not nearly so certain as that they

should have intended to prevent that Government from interfering with their own rights. Whatever therefore may be said abstractly of the inherent and inalienable rights of man as above and beyond the gift of any government, may be of great weight in determining whether the *"people of the United States"* in adopting the Constitution intended its safeguards of personal liberty and private property to be of effect in the territory of the United States; but the argument cannot be made that these are powers never granted by the inhabitants of the territory of the United States, since no one of the powers of Congress over such territory is derived from the inhabitants thereof, but all are derived from the inhabitants of the States.

The power of Congress, then, over the territory of the United States is limited by the will of the people of the several States, and it is to be a question of what the people of these United States (using the term as exclusive of the territory of the United States) have "willed" in reference to limiting this power that we now desire to turn. Sovereign and unlimited power over the territory of the United States does exist in the people of the several States,[6] united in the Federal Government, and the question is whether they have conferred this power on Congress absolutely or qualifiedly.

E. *The Limitations of the Power of Congress over the Territory of the United States.*

In the Constitution it frequently happens that the grant of powers is in general terms, and the same is true of the limitations on such powers. In some parts, however, the language is more definite in reference to their application than in others. We desire to consider first this latter class

[6] See the language of the Court in *Murphy* v. *Ramsey*, 114 U. S. 15, 1885, at page 44: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself."

of passages as expressing more unmistakably the will of the people, and then to turn to the more general question of how far the Constitution itself indicates, by its language, that its general provisions are to be co-extensive with the States except as extended, or co-extensive with the whole dominion of the country except as limited.

Article III, section 2, reads (last paragraph): "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." At first glance this language seems to be of general application. The first clause is general in its terms, but its extent is more clearly outlined by what follows, which shows that crimes committed outside of the States are contemplated by the language of the Article, as well as those committed within them. This apparently makes the right of trial by jury a necessity in all crimes tried under the laws of the Federal Government.

But it should be remembered that this paragraph is in the Article of the Constitution dealing with the judicial power of the United States, and occurring in this connection, a natural construction would restrict it to the proceedings in the courts of the United States. Now the decisions have clearly established the principle that the courts of the Territories are not necessarily courts of the United States, but are so-called legislative courts, established in virtue of the power of Congress to legislate for the territory of the United States. We shall need to refer to this question more in detail when we take up the judicial construction of various passages of the Constitution, but we may cite at this point, as the leading case with reference to this question, *American Insurance Co.* v. *Canter,* 1 Peters, 511, 1828. It is quite possible to conceive that "courts of the United States" might be established in the territory of the United States under this third Article of the Constitution, but that this is not the only source of the power of Congress to establish territorial courts is undoubted.

Since, then, these other courts are established in virtue of other powers, so far as the language here used is concerned, it cannot be regarded as conclusive upon this point, because the context seems to indicate its connection with the courts there authorized alone. Hence we cannot regard the Article as defining decisively its own scope; the natural interpretation would be to confine it, in its application, to the subject matter of the rest of the Article, and therefore determining a rule of procedure required by this clause only in the so-called courts of the United States. More detailed review of its scope must be postponed, since we are now dealing simply with the language of the Constitution.[7]

In Article VI of the Amendments we find language which seems plainly indicative of its own scope: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." The phrase "of the State and district wherein," etc., apparently confines this Amendment to crimes committed within a State, which must, under its provisions, be tried by the United States Court of that district where the crime is against the United States. Of course, these first ten Amendments apply only as restrictions on the legislation of Congress (*Barron* v. *Baltimore,* 7 Peters, 243, 1833), and cannot determine the procedure of the State courts; but even thus, the Article seems clearly to provide only for those crimes tried under the jurisdiction of the United States which have been committed within a State. For the jury is to be drawn "from the State where the crime has been committed," and how could this language apply to the territory of the United States?

This is the natural construction, and there are authorities indicating the limitation of the Article to the States as the

[7] For decisions and comments v. post, p. 88 and p. 91.

proper view. In *United States* v. *Dawson,* 15 Howard, 467, 1853, the defendant had been indicted in the Circuit Court of the United States for an alleged murder in the Indian Country west of the State of Arkansas. It was contended that the place of trial had been changed since the commission of the crime, contrary to the Sixth Amendment. Mr. Justice Nelson, speaking for the Court, says: "But it will be seen from the words of this Amendment, that it applies only to the case of offenses committed within the limits of a State. . . . The language of the Amendment is too particular and specific to leave any doubt about it." And in *Cook* v. *United States,* 138 U. S. 157, 1891, Mr. Justice Harlan says, with reference to the Sixth Amendment at page 181: "That Amendment has reference only to offenses against the United States *committed within a State,"* and cites *United States* v. *Dawson, supra.*

And yet in *Reynolds* v. *United States,* 98 U. S. 154, 1878, Mr. Chief Justice Waite, in discussing challenges which had been made by the defendant to certain jurors, says at the outset: "By the Constitution of the United States (Amendment VI), the accused was entitled to a trial by an impartial jury," and this was with reference to a crime committed in the Territory of Utah, and the case was heard on appeal from the Supreme Court of the Territory.

Here too, then, we are not entirely confident that the scope of the Article is limited by the apparent boundaries of its language, though the case of *United States* v. *Dawson* is a clear authority that that part of the Amendment with reference to the place of trial being previously ascertained refers only to crimes against the United States committed within a State. Whether a different construction should be placed on the other provisions of the Article is made a little doubtful by the language of Chief Justice Waite quoted above. It seems, however, difficult on principle to construe the different parts of this one Article as of different extent; and the natural interpretation of the language would, apparently, bind them together and require a uniform interpretation.[8]

[8] However, v. post, pp. 88 and 91.

The Thirteenth Amendment is clearly of application throughout the possessions of the United States. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction,*" is the language of this Amendment. The territory of the United States is clearly a "place subject to the jurisdiction" of the United States. The origin of this word gives a clear idea of its content. The power having the right to declare the law (*jus dicere*) is the power having jurisdiction, and this power resides in the United States. If the rights of a foreigner under international law were infringed, within any of the territory of the United States, his government would clearly have the right to reparation from the United States for his injuries, on the ground that its citizen or subject had been injured *within the jurisdiction of the United States.* This territory, being, therefore, a place within the jurisdiction of the United States, under the Thirteenth Amendment it is expressly forbidden that slavery or involuntary servitude, except as provided, should exist within its borders. The people of the United States, who have adopted the Constitution, and by whose authority it exists, have so willed it, and have expressed their will in clear terms.

But the language here used is very suggestive. The words show that a place may be "subject to the jurisdiction of the United States," without being "within the United States," and the question naturally arises: What is meant to be included by the term "United States" as used in the Constitution? Is it inclusive of the States and their possessions or merely of the States? This is all the more of interest because in the preamble to the Constitution we find the language: "We, the people of the United States, in order to . . . secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the *United States of America.*" If, then, we had a definite statement as to what the "United States of America" in this phrase is intended to include, since we are expressly told that the intention of the people is to ordain and establish this Constitution *"for* the United States of America," we

should be able to assign at once the limits to the operation of such of its language as is without express qualification. The words "United States" are twice used in the preamble. First it is the "people of the United States" who establish this Constitution. The people of the then territory had no voice in its adoption, for it is an undoubted historical fact that it derived its authority from the ratification of the people of the several States alone. The "United States" here, then, would seem to be exclusive of everything but the States. It is not, "We, people of the United States," but "We, *the* people of the United States," implying that only the people of the States were people of the United States, since to them alone was the Constitution to be submitted.

This language is referred to by the Court in *In re Ross*, 140 U. S. 453, 1891. In that case the petitioner (the case was a habeas corpus proceeding) asked for release claiming that he had been tried without the constitutional requirement of presentment by a grand jury, and trial by a petit jury. He had committed murder on an American vessel, and was tried by the American Consular Court in Japan. Mr. Justice Field, in discussing his claim, says, at page 464: "By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a petit jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." It will be noted that the case does not deal with a crime committed within a part of the territory of the United States, but it does have direct reference to a crime, to the punishment of which the authority of the United States extended; and the case is clear to the point that the authority of the United States and the constitutional guaranties are not necessarily co-extensive outside of the "United States." But as to the precise scope of this term we are still left in doubt. We are assured, however, that these guaranties are *necessarily* operative only in "the United States."

The words of the preamble, "to secure the blessings of liberty to *ourselves* and our posterity" seem to support the view that it is not with a purpose of securing these "blessings" to their territory that the instrument is adopted. They were at the time possessed of territory, and it would not have been overlooked; yet since no inhabitants of the territory could be included among the "we" who adopt, so the "blessings of liberty" do not seem to be intended to be secured to them through this instrument, for they cannot come within the term "ourselves," which is co-extensive with the "we."

Whether, then, the phraseology of the Thirteenth Amendment is intended to show that the "United States," as distinguished from a "place subject to the jurisdiction of the United States," does or does not include the territorial possessions of the United States cannot be said to be concluded by the language of the instrument, though the words of the preamble support the view that this term does not include such possessions.

Judicial construction of this language is very hard to find. In the case of *Loughborough* v. *Blake,* 5 Wheaton, 317, 1820, Chief Justice Marshall, in discussing the clause in the Constitution as to the uniformity of taxation, in reference to the District of Columbia, says, speaking of the extent of the words, "United States": "Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania." And in the *Dred Scott Case,* Chief Justice Taney, in discussing the power of Congress over the territory of the United States, seems to concur in this view, when he uses the words: "The Territories being a part of the United States."

A more recent case dealing with the question of the extent of the term "United States" was decided last June (1900), in the Circuit Court for the Southern District of New York. It arose in reference to the present Porto Rican

tariff—importers of goods from Porto Rico to New York having refused to pay the tax. Their contention was that Porto Rico was a part of the United States, that throughout the United States taxes must be uniform, and hence that the tax in question was unconstitutional, since goods from Porto Rico were taxed when shipped to New York, while no such tax could be imposed had they been shipped from any State of the Union.

The decision is based on the interpretation of the term "United States." The Circuit Judge, Judge Townsend, admits that Porto Rico "is now a part of our dominion, undistinguishable from any other part of the United States, *so far as other powers are concerned.*" But it is an entirely different question, he claims, whether such acquisition determines that the acquired territory shall be incorporated as an integral part under its organic law. This, it is held, is for the determination of Congress either in the exercise of its treaty-making power or by general legislative provisions. Such stipulations of incorporation with the Union have, it is pointed out, formed parts of the treaties of cession of the other acquisitions of the United States, while in the case of Porto Rico they are notably absent. The people of this island, then, "instead of being incorporated into the Union by the treaty, are left in *statu quo.*" And until such incorporation on the part of Congress, the island, though a part of the United States as a political entity, is still a foreign country with respect to the United States in the view of the provisions of the Constitution with regard to commerce, and this may be regulated by Congress without regard to the requirement of uniformity.

The judge refers to the case of *Cross* v. *Harrison,* 16 Howard, 164, 1853, where Mr. Justice Wayne had said: "By the ratification of the treaty California became a part of the United States," but Judge Townsend contends that "it is not at all certain that these words of Mr. Justice Wayne do not mean simply that as to foreign nations California had become a part of the United States by perfected title and, therefore, foreigners could not violate there the law allowing them liberty to trade with the United States under specified conditions." And he refers to the treaty,

the provisions of which contemplate the incorporation of California as part of the United States even with reference to internal relations, keeping in line with his general theory that incorporation must be by some act on the part of Congress.

This theory, laid down in *Goetze & Co.* v. *United States,* 103 Fed. 72, 1900, is admitted to be an "unfamiliar proposition," but the judge claims that it is so because "we have never before had occasion to use the power [to hold territory without incorporating it as an integral part under our organic law] to the same extent." Such power, it is claimed, inheres in the Government of the United States as "an ordinary attribute of sovereignty," thus incidentally strengthening our contention as to the source of the power to acquire territory.

We find here a principle which may be used to explain the relations of the Government with her new possessions. Whether it will prevail, of course, remains to be seen, since this is only a lower court case. But we have here clearly an implied admission that if the territory of the United States be regarded as part thereof, it is to be governed under the provisions of the Constitution wherever applicable. The case proceeds upon an interpretation of the scope of the term "United States," and rests its decision upon the ground that with reference to the extent of the organic law, the island of Porto Rico is not part of the United States, and can become so only by action on the part of Congress.

Loughborough v. *Blake, supra,* is referred to in this case, and its language, quoted above (p. 70), is held inapplicable since, with reference to the territory then held, the treaties by which it had been acquired had stipulated for its incorporation into the Union. This case seems to regard the old Territories integral parts of the Union, and hence within the general provisions of the Constitution, but it claims that the new possessions have not been so incorporated, and until this shall have been done they connot, it is held, be regarded as immediately contemplated by the general provisions of the Constitution.

This decision is with reference to the uniformity of taxation clause of the Constitution. Whether greater readiness

to place restraints upon the action of Congress would prevail in the case where the personal or proprietary rights of the inhabitants of the new territory were more immediately involved was not a question requiring decision in this case. But that such legislation would be more closely scrutinized by the Court and be required to meet with certain tests appears to be the opinion of this Circuit Judge in language to which we shall subsequently refer. The basis of this decision, distinguishing the new territory from the old, incidentally lends its weight to support the view that this old territory is at present (under the provisions of the various treaties in Judge Townsend's view) a part of the United States.

At this point we notice, as illustrative, in a measure, of the view of Congress, the style of various acts, for example, the Act of February 26, 1885, 23 Stat. 332, c. 164, "to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the *United States, its Territories and the District of Columbia,*" apparently excluding these latter from inclusion under the "United States." This bill being with reference to a subject national in character might well be held as extending throughout the dominions of the United States, by virtue of the general term "United States," unless there were serious doubt in the mind of Congress as to such interpretation being justified.[9] Perhaps much weight is not due to this indirect

[9] (The following note has been written after the award of the prize for this essay, and has been added at the suggestion of a member of the Law Faculty of the University of Pennsylvania. No original research has been attempted, but the effort has been to give in a very brief space a short *résumé* of the Administrative Construction of the relation of this government to acquired territory, as this construction was presented in the argument of the insular cases before the Supreme Court of the United States in the October Term, 1900. We find the matter collected and published by order of Congress under the title of "The Insular Cases," House of Representatives, Document No. 509. This document comprises the records, briefs and arguments of counsel and is compiled by Albert H. Howe, Clerk of Printing Records.)

The first necessity for administrative construction of the power of the United States Government over acquired territory arose at the time of the Louisiana purchase. Professor McMaster's remark as to Jefferson's attitude toward this measure has already been referred to

expression of the opinion of Congress, but the question as to what is intended by the words "United States" as used in the preamble cannot be regarded as conclusively established by the language of the instrument itself nor by the

(v. ante, p. 14). The Attorney-General (Mr. Griggs) in his argument for the government insisted that the "generally accepted belief that Jefferson did not believe in the power of the government to acquire territory under the Constitution, is a mistake." It arises, he claims, from a letter written by Mr. Jefferson, August 12, 1803, to Senator Breckenridge, of Kentucky. (See p. 152 of the document above referred to.) But, admitting that this letter by itself would lead to such a conclusion, he argues that as to this point it is fully nullified by other correspondence of Jefferson, which he sets forth in detail, and which to a certain extent justifies his contention.

But, it is argued, what Jefferson did doubt, and what has led to confusion and given rise to the belief that he doubted the presence in the Constitution of the power to acquire territory, was the power of Congress to incorporate foreign territory into our Union. This is where the real difficulty was presented to his mind, and it was a difficulty which he felt could only be overcome by an amendment to the Constitution. He drafted two amendments, in each of which the non-incorporation of the territory by the mere acquisition is tacitly admitted. The first declares: "The province of Louisiana is incorporated with the United States and made part thereof," etc. The second begins as follows: "Louisiana as ceded by France to the United States is made a part of the United States."

This then exhibits the attitude of the Executive upon the arising of the question as to the status of acquired territory. Whatever may be said of the merits of the contention in respect to Jefferson's doubts as to the power to acquire territory, it seems well established that he did not regard the acquisition of territory as *per se* sufficient to make it a part of the "United States," and so subject to all the provisions of the Constitution.

This attitude, it is claimed, was assumed by both the Federalists and the adherents of Jefferson (the Republicans). So in the Senate, Timothy Pickering, as the mouthpiece of the Federalists, said: "It is declared in the third article [*i. e.,* the third article of the treaty by which Louisiana was ceded] that the inhabitants of the ceded territory shall be incorporated in the Union of the United States. *But neither the President and Senate nor the President and Congress are competent to such an act of incorporation.*" The language of other Senators is cited and leads to the conclusion that these distinguished men, far from thinking that the mere act of acquisition incorporated territory into the Union, found difficulty in believing such incorporation possible except under an amendment to the Constitution.

But it is contended by the attorneys for the appellants that these

meagre judicial construction in the reports. Whether, then, the general language of the limitations of the power of Congress is intended to extend them throughout the territory of the United States cannot be conclusively decided from

persons as well as the members of the House of Representatives were met by these difficulties because they regarded the treaty as providing for ultimate statehood, and it is claimed that nothing appears to show that, by the contention that the territory could not be incorporated into the Union, it was implied that Congress could govern it without regard to the Constitution.

The argument for the government, upon this part, of these cases is much more elaborate than that for the appellants, but the above criticism seems just, and however much it may affect the question of citizenship (as to which we have waived discussion) it cannot be regarded as of great weight in reference to the application of the various restrictions of the Constitution to subject territory.

The net result of the history thus adduced in support of the contentions of either side is not very satisfactory, but it is hardly a matter of surprise to find it so, when it is remembered that the country, still in its infancy, was confronted by a problem which was not definitely contemplated by its organic law. It was a question to be worked out rather by the logic of events than by the prearranged theories of the lawgiver.

When the case of Florida came up, and the bill for the organization of the new territory was pending, an amendment was offered providing that "all the principles of the Constitution of the United States, for the securing of civil and religious freedom, and for the security of property, and the sacredness of rights to things in action; and all the prohibitions to legislation, as well as with respect to Congress as the legislatures of the States, be and the *same are* hereby *declared to be applicable* to the said territory as paramount acts." This amendment was opposed by Mr. Rhea, of Tennessee, and was voted down; and Mr. Benton, in his abridgment, commenting on this action says, in part: "This prompt rejection of Mr. Montgomery's proposition shows what the Congress of 1822 thought of the right of Territories to the enjoyment of any part of the Constitution of the United States. . . . The only question between Mr. Montgomery's proposition and the clause already in the bill was as to the tenure by which those rights should be held—whether under the Constitution of the United States or under a law of Congress and the treaty of cession. And the decision was that they should be held under the law and the treaty. Thus a direct issue was made between constitutional rights on one hand and the discretion of Congress on the other in the government of this Territory, and decided promptly and without debate (for there was no speech after that of Mr. Rhea on either side) against the Constitution. It was tantamount to the express declaration: 'You shall have these principles which are in the Constitution, but not as a constitutional

these considerations, however much might be said on the one side or the other, but the question must be considered under other aspects.

In turning to the reports in reference to the limitations of

right, nor even as a grant under the Constitution, but as a justice flowing from our discretion, and as an obligation imposed by the treaty which transferred you to our sovereignty.'" (Benton's Abridgment, Vol. VII, p. 295, note.)

An incident, arising in consequence of the acquisition of Florida, illustrates the attitude of the Executive at this time. Jackson had been appointed governor of Florida, and assumed many powers that bordered close upon the despotic. Upon one occasion he "arbitrarily seized three persons who had refused to deliver over to him certain papers which he had demanded." At this time Judge Fromentin was a Federal judge in this district, having been appointed by President Monroe. At the instance of certain persons he issued a writ of habeas corpus. When this was served on Jackson he refused to obey it, and summoned the judge to appear before him and answer as for a contempt. A violent controversy arose, marked especially on the part of Jackson by the use of very strong language. An appeal was had to the administration at Washington, and the issue was determined in favor of Jackson. President Monroe, through his Secretary of State, John Quincy Adams, directed the judge to decline further intrusion. Thus Adams writes: "I am directed by the President to inform you that the laws of the United States relative to the revenue and its collection and those relating to the slave trade having been the only ones extended by Act of Congress to the Territories of Florida, it was to the execution only of them that your commission as judge of the United States was considered and intended to apply. *The President thought the authority of Congress alone competent to extend other laws of the United States to newly-acquired territory;* nor could he give to the judges a jurisdiction which could only be conferred by them." (Annals of Congress, first session, Seventeenth Congress, Vol. II, p. 2411.) It is noteworthy that three statesmen, Monroe, Jackson and John Quincy Adams, each a President of the United States, were concerned in this case.

"When Oregon was established as a government, Congress passed an act extending the ordinance of 1787 to its inhabitants, and expressly extending the revenue laws of the United States to it. A Territorial government was established for Missouri in 1812. It was not assumed by Congress that all the privileges, immunities and guarantees of the Constitution extended there, because Congress proceeded specifically to pass an act in which a modified bill of rights, modeled somewhat after the bill of rights in the ordinance of 1787, was extended to the inhabitants of Missouri. And when Wisconsin was set up as a Territory the laws of the United States were by that act extended to

the power of Congress over the territory of the United States, we wish to consider, first, some of the general language upon this point, and then the decisions which more immediately deal with the precise question.

The power to govern the territory of the United States

the Territory. When New Mexico was set up as a Territory in 1850, it was provided that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within said Territory of New Mexico as elsewhere within the United States." (Argument of the Attorney-General in the case of *Goetze & Co.* v. *United States,* "The Insular Cases," document above referred to, p. 320.)

The debate in the United States Senate in February, 1849, on a resolution to extend the Constitution to California and New Mexico, is cited at some length by both sides in the late cases, but since it discloses a divergence of opinion in the minds of the various Senators, it can hardly be regarded as indicative of any precise attitude on the part of the body as a whole. Further, the burning question involved was slavery, and this swayed the partisans to a particular stand, and compelled them to treat the question of the applicability of the Constitution to acquired territory as subordinate, and as merely a link in the chain of reasoning by which they determined the rights of slaveholders in such territory. We shall therefore not quote from the various opinions expressed at that time.

The administrative construction in reference to the necessity for some act of incorporation by Congress is apparently in favor of the contention of the government, though it seems to be a question which did not assume an aspect of great importance until the question of slavery made it of vital interest. Then the two contentions at once found numerous supporters. In saying this we place upon the dispute which arose in regard to the Louisiana purchase the construction urged by the attorneys for the appellants in the insular cases.

Just how much weight should be given to the administrative interpretation referred to will probably depend largely upon one's individual attitude towards our scheme of government. Without doubt, the ultimate determination of all such Constitutional questions is with the Supreme Court of the United States. On the one hand it is an easy argument to say that under the peculiar power given to the Supreme Court steps should be taken with great caution and a continued and uniform interpretation of the Constitution by the Executive and Legislative branches of the government should be accepted unless flagrantly wrong. On the other it may be urged that the Court is less influenced by the inducements of the moment, and hence more sure and certain in its interpretation of the will of the people. It is an old and fundamental question, and one whose solution will necessarily be worked out with the progress of our country's history.

having been vested in Congress, Congress is supreme with respect to this territory except as to such constitutional limitations as may be found to exist. This is just the converse of the extent of its power over the States, in which its several powers are limited to those which are expressly conferred or necessarily implied. So to this effect we find the language of *National Bank* v. *County of Yankton,* 101 U. S. 129, 1879, at page 133, in reference to the power of Congress to validate the bonds of a Territory: "The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. . . Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution."

So in *Murphy* v. *Ramsey,* 114 U. S. 15, 1885, a case with reference to the power of Congress to prescribe the qualifications of voters in the Territory of Utah, the Court says, at page 44, speaking through Mr. Justice Matthews: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress. . . . The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its

terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

And in *Shively* v. *Bowlby,* 152 U. S. 1, 1894, the Court, citing among others the two cases just referred to, says, at page 48: "By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition."

From this general language of the Court we may conclude that the power of Congress over the territory of the United States is plenary, except as limited; that these limitations may arise in one or more of three ways: first, by the express words of the Constitution; second, by necessary implication therefrom; third, by "the purposes and objects of the power itself."

In reference to express limitations a question of great practical importance arises with respect to the first ten Amendments to the Constitution. On this point we find the words of Chief Justice Taney in the *Dred Scott Case,* 19 Howard, 449: "The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved." Then enumerating the specific guaranties of the Amendments, he goes on to say: "The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution

gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers."

In this same case Mr. Justice Campbell in his opinion, says, at page 513: "The advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories."

To the same effect, though not so definitely, is the language of the Court in *Maynard* v. *Hill,* 125 U. S. 190, 1888, at page 204: "The power [of legislation] was extended 'to all rightful subjects of legislation,' to which was added in some acts . . . 'not inconsistent with the Constitution and laws of the United States,' *a condition necessarily existing in the absence of express declaration to that effect.*"

On the other hand, we find language looking the other way in the opinion of Mr. Justice Johnson delivered at Circuit in the case of the *American Insurance Co.* v. *Canter,* 1 Peters, 511, 1828, at page 517: "The right of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new States into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is uncontrolled by treaty. . . . And in case of such acquisitions, *I see nothing in which the power acquired over the ceded territories can vary from the power acquired under the law of nations by any other government over acquired or ceded territory.*" This, however, being an opinion delivered at Circuit, and this part of the opinion not having been reiterated in the opinion of the Court, as delivered by Mr. Chief Justice Marshall on appeal to the Supreme Court, cannot be regarded as of much weight in

comparison with an opinion of the Supreme Court, though Justice Johnson was at that time a member of that Court.

But in *Mormon Church* v. *United States,* 136 U. S. 1, 1890, at page 44, Mr. Justice Bradley, in reference to these express limitations on the power of Congress, says: "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions."

In the recent case, above referred to—*Goetze & Co.* v. *United States,* 103 Fed. 72, 1900—Judge Townsend, referring to this passage, in *Mormon Church* v. *United States,* says: "If the United States tried to govern any territory in violation of the spirit pervading republican institutions, such action might be held illegal by the courts on the basis of this principle [that is "that a Republic cannot be allowed to govern without any restraint"]. It may be admitted that the Constitutional guaranties of civil rights would apply to territory under the sovereignty, but not a part of the United States. Certain civil rights, which we believe belong to every one, are crystallized into the negative provisions of our Constitution in order to prevent any wrongful or improper use of our power, and these may be held to control our power wherever it reaches. These considerations may be found to limit us in governing any territory. Whether they do or not it is not necessary here to decide. If they do it will be because we cannot violate the principles of government imbedded in our institutions; not because Porto Rico is part of the American nation; it will be for the reasons thus stated by Mr. Justice Bradley in *Mormon Church* v. *United States,*" quoting the language as we have quoted it above.

With reference to the third source from which limitations of the power of Congress over the territory of the United States may be said to spring, namely, from the purposes and objects of the power, we notice a passage from the dissenting opinion of Mr. Justice McLean in the *Dred Scott*

Case, at page 542: "In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers."

We have quoted thus at length from the opinions of the various members of the Court, as being the only way in which we could adequately bring together and compare the various views in reference to the limitation of the power of Congress over the territory of the United States. Justice McLean evidently regards Statehood, as, under the Constitution, the necessary end of all territory acquired by the United States, and argues that the rules adopted by Congress must be such as are legitimately adapted to this end. His views are applicable, however, if the object for which territory is held be regarded as other than Statehood. The limitations would naturally vary with the object for which such territory would be held. Conceding, however, that the object in view be constitutional, it brings the operation of the power of Congress to legislate within the general doctrine of the implied powers, and seems to regard as untenable the position that the express limitations of the Amendments are applicable in the territory of the United States *ex proprio vigore*[10] by its silence with regard to them

[10] By this convenient term *ex proprio vigore,* so frequently used at present, we mean that its terms *have been intended* by those who have adopted the Constitution to include the territory of the United States, and so do not need the sanction of an act of Congress to make them there operative, but extend *of their own force* throughout the land. Not that an act of Congress could extend the Constitution to the new territory. Such an enactment might declare its provisions in force, but they would derive their authority not directly from the will of those who adopted the Constitution, but mediately through the intervening will of Congress, like any other enactment of the Federal Legislature.

and its assignment of the limitations to an entirely different source than the express terms of the Amendments.

Are these apparently varying views expressed in these different cases necessarily irreconcilable? The three sources of limitations referred to by Mr. Justice Matthews in *Murphy* v. *Ramsey, supra,* include those discussed in the cases just cited. Limitations necessarily implied can well be regarded as included with those expressly imposed, since all rules of construction would admit their existence. As between the limitations expressed and those which flow from the purposes and objects of the power itself, it is easily conceivable that these might be identical. The powers conferred on Congress over the territory of the United States are plenary except as restricted. (*National Bank* v. *County of Yankton, supra.*) The restrictions arise in regard to matters which are not necessary and proper to fulfil the constitutional object for which the territory is held, whatever that object may be, and are for the determination of the Supreme Court in the last instance. If these restrictions have been decided in certain cases to be such as are expressly enumerated in the Amendments to the Constitution, is this necessarily decisive of the question whether these Amendments are in force *ex proprio vigore.* May it not be that the Court has so decided merely because the violation of those Amendments would give rise to acts not necessary and proper to the general purpose for which the territory is held? It is apparent that the same restriction might arise, whichever might be regarded as its source. *As* to this

Under the doctrine of *Goetze* v. *United States,* the theory seems to be that Congress may incorporate territory, and thus bring it within the operation of constitutional provisions, just as it may admit a State and bring former territory under the provisions of the Constitution referring to States. But this is primarily a determination of the status of the possessions of the United States, which determination under the doctrine of that case is confided to Congress; but Congress no more extends the Constitution than it does when it admits a State. Under its constitutional power (assuming for the moment that the case is law) it determines the status of the territory. The Constitution then extends to it by virtue of the will of those who adopted it, just as certain of its provisions are broadened in their scope by the admission of every new State.

source, we have seen that the language of the Court varies. Chief Justice Taney in the *Dred Scott Case* seems clear to the effect that the Amendments extend of themselves to the territory of the United States, while Justice Bradley in *Mormon Church* v. *United States* expressly doubts the authority of those Amendments in the territory of their own force.

As illustrative of the point we wish to make, we may consider the First Amendment to the Constitution in reference to the establishment of a religion. Whether territory is held with the prospect of ultimate Statehood or of continued colonial character, it is readily conceivable that the establishment of a religion would not be regarded by the Court as flowing from the "purposes and objects" for which such territory might be held, and hence was one of those limitations which the people of the States, in adopting the Constitution, had intended to place upon the power of Congress over the territory. This would accomplish the same end as though it were held that the First Amendment is of its own force (*ex proprio vigore*) immediately controlling in the territory of the United States. Other Amendments might be considered in the same way, and the same result reached.

In coming to a conclusion upon such questions it is very probable that the theory of our political institutions and the general doctrines which have been built upon our free form of government, should play a large part in determining whether the people intended to restrict the power of Congress in a certain respect, as not being necessary and proper to allow it, in view, as Mr. Justice Bradley puts it, "of the general spirit of the Constitution." Such considerations are more or less political in character, and the Court might well give Congress a wider latitude than in its legislation directly for the States, where the Amendments are expressly and immediately controlling. But it cannot be doubted that the general spirit of the Constitution, the purposes and objects for which territory is held, the theory of republican institutions, may all concur to impose on the action of Congress those limitations which "are crystallized into the negative provisions of our Constitution."

The history of the adoption of the first ten Amendments rather favors the view that they were to be applicable, first of all, to the States whose inhabitants had adopted them. Having been added to the Constitution in consequence of excessive fear of the power of the General Government over those who themselves had created it, it was for the immediate purpose of protecting their own rights. If it is to be extended further, to their possessions, it is a very reasonable view to regard it as so extending in virtue of the intention of the people adopting it to grant no powers inconsistent with the general theory underlying all the structure of the Government.

The language of the preamble tends towards the view that the general language of the Constitution is limited to the States, and if it is to be further extended, it is by inference from its general spirit. The historical facts in reference to the first ten Amendments point in the same direction. We have endeavored to show that the views of the judges with reference to express restrictions, implied restrictions, and such as flow from the purposes and objects of the power conferred, are not *necessarily* antagonistic. In discussing the cases which have arisen as to the application of the provisions of the Constitution to the territory of the United States, we wish, in addition to noting the provisions which have been held applicable, to find, as far as possible, the view of the Court in reference to the authority of the provision in question, whether it controls in consequence of such territory being within the intended scope of such provision, or in virtue of its relation to the object for which the power to govern the territory is conferred.

The earliest case to which we shall refer is the *Dred Scott Case*. Of course, as we have admitted before, much of the language of that case is weakened by the peculiar nature of the decision, the large proportion of *dicta* and the subsequent historical events; but even so, the careful consideration given to its various details by the different judges renders their conclusions worthy of no small consideration. In this case the judges who considered the Missouri Compromise and agreed in holding it unconstitutional (Taney, C. J., Wayne, Grier, Daniel, Campbell, and Catron, JJ.) do

so, partly on the ground that it is violative of Amendment V, denying to Congress the power to deprive any person "of life, liberty, or property without due process of law," and partly as violative of Article IV, section 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Thus Chief Justice Taney, referring in detail to the restrictions placed upon Congress by the Amendments, says at page 450: "These powers and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law." So in the general language of the Chief Justice, quoted above (p. 79), the Amendments are regarded as intended for the Territories as well as the States, and in applying this general principle to the particular facts of the case, he draws the restriction on the power of Congress directly from the language of this Amendment; as Mr. Justice Catron on a subsequent page (527) draws the restriction from the second section of Article IV.

The two dissenting Justices in this case (McLean and Curtis), who regard the Missouri Compromise as valid, do so, not on the ground of the inapplicability of these constitutional provisions, but because, as they contend, they are not violated, since slaves are not property within the meaning of the Constitution except where slavery is established, and as that is a matter of local legislation, and as such property was not recognized in the Territories, no deprivation had occurred. This whole case bears strongly on the side of the contention that the whole Constitution, where its

terms are not restricted, includes within its express language the entire dominion of the United States. The case, therefore, supports the view of those who find the limitations on the power of Congress in the general restrictive language of the express provisions of the Constitution, and not in any inference from the nature of the power conferred, or the general spirit of the instrument.

In *Hopt* v. *Utah,* 110 U. S. 574, 1884, at page 579, Mr. Justice Harlan, discussing the necessity of the presence of the accused on a trial for murder, says: "If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." Now this was said, not in reference to an act of Congress, as was the case in *Dred Scott* v. *Sandford,* but in reference to procedure under the code of Utah, then a Territory; and by act of Congress the Constitution had been made part of the fundamental law of the Territory, and hence from this source might have been derived the restriction on the Territorial legislation, yet the language of the Court apparently indicates an immediate restriction from the Constitution itself. If it does so operate, *per se,* it is, as we have sought to show above (p. 61), binding on Congress in similar measure. So in a later part of the same decision (at page 588) the question of the consistency of the Territorial law with the *ex post facto* restriction was considered, and in the discussion it was taken for granted that this part of the Constitution restrained the power of the Territory. Here, again, the tone of the discussion indicates a necessity of compliance with the Constitution irrespective of the organic law. This, however, is an inference from the form of the discussion, and, under the facts of the case, an express assertion to this effect would have been *dictum.* The case, nevertheless, seems to support the view of the matter prevailing in the *Dred Scott Case.*

The next case to which we desire to refer is a case which arose with respect to the District of Columbia, but the principle of the case applies equally well to the territory of the United States—in fact the authorities cited are in reference to the Territories. In *Callan* v. *Wilson,* 127 U. S. 540, 1888, the question was as to the rights of the inhabitants

of the District to trial by jury, the trial in that instance having been without a jury. Mr. Justice Harlan, in considering the claim to this right as existing, refers to the Third Article of the Constitution providing that the trial of all crimes except in cases of impeachment be by jury, to the Fifth Amendment requiring due process of law, and to the Sixth Amendment requiring that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed," etc. The opinion of the Court regards the section of the Third Article, referred to, as securing a jury trial, and the Sixth Amendment as "an enumeration of the rights of the accused in criminal prosecutions." "This recognition," says the Court, "was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States."

Here again the Court regards these restrictions as intended to operate in the District of Columbia, and by parity of reasoning, in the other territory of the United States. Under the view taken by the Court, as enunciated by Mr. Justice Harlan, it became unnecessary to decide whether the Fifth Amendment was operative or not; but it was this same judge who so regarded it in *Hopt* v. *Utah.* The Court is not clear in its reference to the Sixth Amendment, which, as we have pointed out above,[11] seems confined by its own language to the States. This case cites with approval *Reynolds* v. *United States,* 98 U. S. 145, 1878, at page 154, saying that it was there "taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions. . . . We cannot think that the people of the District have, in that regard, less rights than those accorded to the people of the Territories of the United States." But the attitude of the Court towards the limitations is as in the preceding case, regarding them as flowing from the express language of the Constitution, which in its

[11] V. ante, p. 66 ff.

use of general terms is considered as extending over the entire possessions of the country.

To the same effect is *Davis* v. *Beason,* 133 U. S. 333, 1890, where the regulations of Idaho in regard to the qualifications of office-holders and so forth, denying such privilege to bigamists and polygamists, was upheld. The argument had been made that the legislation of the Territory was violative of the First Amendment to the Constitution; and the Court taking for granted that it must meet the test of conformity to this Amendment, discussed it in relation thereto, but decided it to be no infringement. Here again it was to the exact language of the Constitution as a standard that it was referred, and not to general principles. However, it must be remembered that in this case the organic act rendered the Constitution applicable, though to that act no reference is made by the Court.

The power of eminent domain in Congress is restricted by the Fifth Amendment in that it declares that no "private property shall be taken for public use, without just compensation." This restriction of the Amendment was declared applicable to the case of Indian land situated in a Territory in the case of *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641, 1890, at page 657, the Court assuming without discussion that this limitation was binding on Congress under such circumstances. The case can hardly be said to throw much light on the exact question of whether the limitation springs immediately from the words of the instrument, or arises in consequence of the general spirit of our free institutions. However the fact that the very words of the Amendment ("taken without just compensation") are used, makes this case support, in a slight measure at least, the preceding cases to which we have already referred.

In *Mormon Church* v. *United States,* 136 U. S. 1, 1890, the constitutional guaranty of religious freedom was again appealed to, this time as forbidding legislation repealing the charter of the Church of Jesus Christ of Latter Day Saints, and secondly there was called in question the power of Congress and the Court to seize the property of the same and hold for purposes specified in the decree of the lower court. Mr. Justice Bradley, delivering the opinion of the Court,

does not deny the authority of the First Amendment in the territory of the United States, but regards the action of Congress and the courts as not in conflict with it. The significant part of the opinion is the passage in which he speaks of the principle on which these restrictions limit the power of Congress: "Doubtless," he says, "Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, than by any express and direct application of its provisions." This marks a departure in the theory of the Court as to the basis upon which these limitations rest. Of course, granting that they do exist, it was in this case not necessary to decide their source. But, at any rate, the opinion shows the attitude of Mr. Justice Bradley, if not of the justices who concurred with him.

In *Cook* v. *United States,* 138 U. S. 157, 1891, Mr. Justice Harlan takes for granted that the second section of Article III, securing the right of trial by jury, is in force in the Territories, but claims it is not in that case violated (p. 182). So also he comes to the same conclusion in regard to the contention of the defendant that the law under which he was tried was *ex post facto.* As in the former cases decided by this judge, the theory, apparent in the language of the opinion, is that the express provisions of the Constitution are immediately and directly applicable.

The question as to the conflict of a statute of the Territory of New Mexico with the Seventh Amendment arose in *Walker* v. *Southern Pacific Railroad,* 165 U. S. 593, 1897, but the Court deems it unnecessary to consider the contention made "that the Seventh Amendment is not operative in the Territories," since trial by jury had been secured to the Territory by an act of Congress. This evasion of even a *dictum* upon this subject makes evident that the Justice who delivered the opinion of the Court (Justice Brewer) did not regard it a settled question whether these provisions of the Constitution are operative *per se* in the Territories.

This doubt in his mind is made more apparent in the opinion delivered by him little more than a month later in

the case of *American Publishing Co.* v. *Fisher,* 166 U. S. 464, 1897, where, in discussing the applicability of the same Amendment, he refers to some of the cases on both sides of the question and then avoids the issue by referring to the acts of Congress extending the provisions of the Constitution over the Territory and securing the right of trial by jury.

And yet in this same volume of the reports, in an opinion delivered only two weeks later (*Springville* v. *Thomas,* 166 U. S. 707, 1897), the Court, speaking through Mr. Chief Justice Fuller, says: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so"; and the Court reversed a judgment entered upon a verdict returned by less than the whole number of jurors.

Referring to the passage just quoted, Mr. Justice Harlan says, in *Thomson* v. *Utah,* 170 U.S. 343, 1898: "It is equally beyond question that the provisions of the National Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the Territories of the United States." So also he says: "That the provisions of the Constitution relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question." Even the Sixth Amendment, it is intimated, is applicable (pp. 346, 347, 349), but whether these provisions are applicable because they are intended so to be, or because to hold otherwise would be inconsistent with those fundamental limitations in favor of life, liberty and property, which lie at the basis of our institutions is undecided. In other words, we derive no light upon the general question, the answer to which we are at present seeking. Mr. Justice Harlan refers to the language of various cases, but expresses no opinion upon this question, concluding his citations by saying merely: "Assuming then that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the Territories of the United States," etc.

It was taken for granted in *Central Loan & Trust Co.* v. *Campbell,* 173 U.S.84, 1899, at page 97, that the Fourteenth Amendment was controlling in the Territories, though the Court regards the act in question as not in conflict therewith, and does not go into a discussion of the nature of the source of the limitation.

So in *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 1899, at pages 5 and 37, it was assumed that the provisions in the Federal Constitution securing the right of trial by jury in civil and criminal cases applied to the District of Columbia, and the discussion proceeded on that basis.

In connection with these cases, which deal more immediately with the provisions of the Constitution securing to the citizen protection in his personal and proprietary rights, we wish to refer again to the case already cited of *Loughborough* v. *Blake,* 5 Wheaton, 317, 1820, where it is held that a general direct tax is, in relation to the District of Columbia, subject to the rule of apportionment just as such tax is subject in reference to any State.

On the other hand, we have the recent case, to which we have referred several times, of *Goetze & Co.* v. *United States,* which held that the provision requiring uniformity of taxation throughout the United States was inapplicable in reference to the Porto Rican tariff. The ground of this decision, that with reference to the organic law Porto Rico is not a part of the United States, has already been dwelt on, as also the line of distinction it drew in regard to the *dicta* of *Loughborough* v. *Blake.*[12] We wish to emphasize again, that it, unlike the cases referred to just above, does not so closely touch the personal and proprietary rights of the inhabitants of these islands. Where a question of that nature arises, the Court intimates, legislation infringing such rights might be held unconstitutional, not as being voided by the express terms of the Amendments, but as being contrary to the principles of republican government.[13] [14]

[12] V. ante, pp. 70 to 73.

[13] V. ante, p. 81.

[14] It is worthy of note in passing that the decision is with reference to goods shipped from Porto Rico to the United States. A very

In considering the results of these cases we first of all note that certain provisions of the Constitution have been held applicable in the Territories, viz., the right of trial by jury in civil and criminal cases, as provided in the Constitution, the guaranty of religious freedom, the *ex post facto* prohibition, the Fifth Amendment, the clause concerning the apportionment of direct taxes, and the clause guaranteeing to citizens of each State, all privileges and immunities of citizens of the several States.

This is, of course, the immediate effect of these decisions, but back of them, as the basis upon which they rest, we find that the tendency of most of the cases is to regard these provisions as operating in the Territories because their general language was intended by the framers of the instrument to apply in this manner, and not merely because they formulate guaranties of security and liberty which are the fundamental restraints of all free governments. To be sure, we have found opinions which tend in the other direction, principally those of Mr. Justice Bradley and Mr. Justice Brewer, just as we found varying views when we considered the general language used by the Court. But the greater number of the decisions have shown a tendency to regard the provisions as *directly applicable ex proprio vigore.* It is true that this is the earlier view, and that cases on the other side have appeared, which, if they have not marked a departure, have not been without influence upon later cases, notably the case of *Mormon Church* v. *United States, supra,* where the language used by Mr. Justice Bradley, to which reference has been made several times, occurred.

It can hardly be said that at present a tendency exists in either direction, and the question may be regarded as an open one, so that it becomes impossible to affirm with confidence what would be the decision if the restriction of other Amendments, not yet passed on by the Court, should be claimed to

different question would arise in reference to goods shipped from a State to Porto Rico. In such case the clause denying to Congress the right to tax the exports of a State would require interpretation, and it is difficult to believe that a tax could be collected at the port where the goods are landed, when it could not be laid at the port where the goods are shipped.

exist. Doubtless considerations such as those mentioned in the general language of the Court, referred to before, as to whether the restrictions were necessary and proper to effectuate the object for which the territory might be held, whether they flowed from its "purposes and objects," whether they are or are not inconsistent with the theory of our frame of government, would have weight in aiding the Court to decide whether the people in framing certain provisions intended their operation to be co-extensive with the territory of the United States, or limited only to the States.

It is a significant fact that in no case in regard to jurisdiction within the territory of the United States has a limitation of the power of Congress over personal or proprietary rights been held inapplicable. Even with regard to the Sixth Amendment, which seems confined by its wording to the States, and has been so adjudged in several cases,[15] it has been several times suggested that its provisions are in force in the territory of the United States; and these facts, together with the number of cases which refer immediately to the Amendments as controlling *per se,* make it improbable that the Court will hold any general provision limiting the power of Congress over personal and proprietary rights inapplicable in any part of the possessions of the United States. Even Mr. Justice Bradley, in the language he uses in *Mormon Church* v. *United States, supra,* does not intimate that he regards any of those provisions inapplicable, but rather that, in his view, they are a formulation of the restrictions on all free governments, applicable expressly in the States with respect to the legislation of Congress, and under the spirit of the Constitution applicable also in the territory of the United States.

This review of the particular instances in which the application of certain provisions of the Constitution to the territory of the United States has been drawn in question, enables us to consider, if not conclusively, at any rate more clearly the general language of the Court in reference to the limitation of the power of Congress. The same variance

[15] V. ante, p. 66.

in views has appeared here as appeared there, and, as has just been pointed out, the cases which refer the restrictions to other sources than the express provisions of the Constitution are the more recent. However we still contend, as we did then, that whichever way the balance may turn, it is still possible to show that the various considerations combine to render applicable the guaranties of the Constitution, and unite their weight to produce the conviction that the territory of the United States was designed to be governed with that security for life, liberty and property which is enjoyed in the States.

There are a number of cases, forming as it were a class by themselves, to which reference must be made in this connection. These are the cases in relation to the courts established under the authority of the United States in the Territories. These courts, as was long ago held in *American Insurance Co.* v. *Canter,* 1 Peters, 511, 1828, are not the courts provided for in the third Article of the Constitution, but are established in virtue of the power of Congress to legislate for the territory of the United States. Their judges are appointed for a limited period only. This is, of course, not in accord with the requirement in regard to the judges of the courts of the United States, whose tenure of office continues, as provided in the first section of Article III of the Constitution, "during good behavior." But this difference is justified on the basis that this provision is intended only for the so-called courts of the United States, and not for the courts of the Territories though established under the authority of the Federal Government. (*McAllister* v. *United States,* 141 U. S. 174, 1891, and cases cited.) And yet under the same construction it would be natural to conclude that the provision in the second section of the same Article requiring that all crimes, except in cases of impeachment, shall be tried by jury, is applicable only to procedure in the courts of the United States, and not to Territorial courts, but we have seen that this provision has expressly been held to apply to the Territories.[16] Both clauses occur in the same Article of the Constitution, and both would

[16] V. ante, p. 65.

naturally be expected to have the same scope. When, then, the provision of the first section is restrained to the so-called constitutional courts of the United States, it seems inconsistent to enlarge the scope of this second section beyond this same limit.

The differing lines of cases have not been compared and distinguished in the reports, but two considerations suggest themselves as affording reasons for making a difference in the construction of these two sections.

In the first place, since, until recently, territory has been held with the avowed ultimate object of Statehood, the territorial courts have necessarily been merely temporary courts, and to have appointed a judge for life might have been to have left him without a court long before the end of his life. Now the courts of the Constitution are intended to be permanent, and in view of this difference it may well be that the provision as to the tenure of office extending "during good behavior," was intended only for the permanent courts. No difficulty like this arises in regard to the requirement that all crimes be tried by jury. Whether the court be temporary or permanent, the object of this requirement is just as necessary, just as beneficial, just as easily carried out. It is quite reasonable, therefore, to regard this section as intended for all courts created under the authority of the Federal Government, while we regard the part of the first section referred to just above as inapplicable.

In the second place, the difference in the importance of the provisions will be at once observed. The life tenure of the judges holds a far less important place in the organization of government than trial by jury, which has come to be viewed in the Anglo-Saxon mind almost as an integral part of free government. The requirement of trial by jury has a far greater influence on the personal and proprietary rights of the citizen than the life tenure of the judges, and it might well be believed that the people in adopting the Constitution intended this provision to be co-extensive with the judicial authority of the Government throughout its territory, while the life tenure of judicial office, however excellent a provision, was intended to be confined to the courts there provided for, that is, the constitutional courts.

But whether or not these considerations afford substantial grounds of distinction, the class of cases which hold that the tenure of judges in the Territories may be limited do so, not by disregarding a provision of the Constitution, but by interpreting it as having no reference, under the language of the instrument, to the courts of the Territories. These cases, then, form no exception to the statement made above that in no instance have general provisions of the Constitution been held inapplicable to the Territories, since this provision of the Constitution, in consequence of the context, is not a general provision, but is limited to the courts provided for in that Article.

It is yet to be decided that any general provision of the Constitution relating to personal or proprietary rights is inapplicable in the territory of the United States, but the cases to which reference has been made clearly demonstrate that limitations of the power of Congress over the territory do exist, and it is only the extent of these limtations that remains a question.

Does this alter the position taken in an earlier part of this paper[17] that the Territory is essentially a colonial form of government? We think not. The government under which they exist is imposed upon them without any consent of their own. If it is a limited form of government, the limitations arise, not because the inhabitants of the Territory have so willed it, but because their rulers, the people of the United States, have declared it to be *their* will. The power which exists in the people of the United States over the inhabitants of their territory is just as ample as that existing in the British people over their colonies. The difference is that in Great Britain all this power is immediately in the hands of Parliament, while in our country the people of the United States (using that term in its limited sense) have delegated to Congress only part of their authority. But the residue might be delegated at any time, and Congress be made as omnipotent with respect to the territory of the United States, as is Parliament with respect to the colonies. It is not the mode of the exercise of the power over pos-

[17] V. ante, p. 39 ff.

sessions, whether gentle or harsh, that determines the colonial nature of a government. It is the existence of the power. Canada may have as free a government as a Territory—is either less a colony? Under the form of government prevailing in England, Canada might be deprived of its free form of government by an Act of Parliament. A Territory has no more power to resist such a change with respect to itself than has Canada. The people of the United States may have made it a little difficult for them to exercise the power they possess, but that does not meet the contention that that power exists. The Territories may be regarded as "Constitutional Colonies," but colonies they undoubtedly are in view of the fact that they are in all things subject to the will of the people of the United States, and that their government springs not from themselves, but from the determination of their sovereign owners.

The question naturally arises at this point in regard to the application of these limitations of the power of Congress over the new possessions of the United States. The decisions to which we have been able to refer have, with one exception, and that a lower court case, been in reference to territory held with the ultimate object of Statehood. The difference in racial traits and traditions between the inhabitants of the old territory and of the new possessions is a consideration of no little importance. The insular character of these possessions, and the fact that they are not contiguous to any part of the prior territory of the United States, may become of extreme importance in finally determining the application of various clauses of the Constitution, for example, the uniformity of taxation clause in reference to the laying of duty on imports (a question already passed on by the lower court). It is impossible to say to what extent the provisions of the Constitution will be regarded as intended to be applicable to such new acquisitions, and how far former decisions will be regarded as controlling. Undoubtedly the strongest considerations for regarding these limitations in force in these islands exist with reference to the guaranties of personal and proprietary rights, and it may be asserted with some confidence that the decisions affirming the existence of these in the old territory

would be held controlling with reference to the new possessions.

On the other hand, where these are not so immediately concerned, the general principle several times alluded to in the reports that the powers must be determined by the nature of the purposes and objects for which the territory is held, might become the test of the existence of powers asserted to exist in Congress. No doubt the view of Mr. Justice Bradley that there are fundamental limitations which restrain all *free* governments and arise from the very spirit of our Constitution would be of weight in solving particular cases in which these "fundamental limitations" might be claimed to have been invaded. From the cases which have come up in the old territory arise decisions which form the best precedents from which a study of these new problems can be made. It is with this belief that this review of the cases has been made and their general result sought to be deduced. In our contention that the Territory is a temporary colony, we find a reason for believing that the inhabitants of the new possessions, if held as colonists, must be governed under the same limitations as to personal and proprietary rights as the inhabitants of the old Territories.

The requirement insisted on in *Goetze & Co.* v. *United States,* of incorporation by some action on the part of Congress before territory can be regarded a part of the United States in relation to its organic law, gives us a principle, which might furnish a basis of distinction for a case arising in the new territory as opposed to the old, which Judge Townsend claimed had been incorporated. Whether this principle shall be finally adopted by the United States Supreme Court is yet to be decided, but its use in this case is another indication of the wide scope argument might take with respect to the applicability of various general provisions of the Constitution.

Of course, we have the relations of the United States with the Indians as an illustration of one form in which a subject people may be governed. If this mode of government is constitutional, and it is undoubtedly so regarded by the Court, it furnishes a possible form which the control of these possessions by Congress might assume. In such case the

authorities we have cited could not be regarded as necessarily controlling. It is not our purpose to go into the subject of the relations of the United States Government with the Indians, but we may refer to the case of *Talton* v. *Mayes,* 163 U. S. 376, 1896, where it was decided that the Fifth Amendment to the Constitution did not apply to local legislation of the Cherokee Nation so as to require prosecutions for offences committed against the laws of that nation to be initiated by a grand jury, as prescribed by that Amendment. Doubtless the relations of our Government with these "dependent domestic nations" has been largely a matter of historical growth, to which fact this case bears witness. However these relations are parts of a present status, which, in a modified form, might be set up in the new possessions. Under such circumstances it appears, under the decision just cited, that local legislation would not necessarily be required to conform in all respects to the provisions of the Federal Constitution.

These questions bring us largely into speculation. Political problems are to be solved and the form of government more particularly defined and established before full and complete discussion can take place. To study these questions has not been the purpose of this paper, but, as we said, at the outset, our purpose has been *to consider the basic principles which thus far have controlled the relations of the United States with its possessions.* This we believe is the source from which can be derived most certainly the solution of the question of the constitutionality of the attitude which the Government may assume towards its latest acquisitions. It is with this purpose that we have studied the subject, and in the more than brief consideration we have given to the new possessions of our Country, we have merely meant to make suggestions in passing as to reasons which might tend to render the decisions already made controlling or otherwise.

In the discussion of the questions to which we have given our attention, research has frequently been rendered difficult in view of the scarcity of actual decisions upon the precise point at issue or upon questions closely related. In many instances we have been compelled to rely merely upon ex-

pressions of opinion on the part of the Court, or upon the discussion of general principles preliminary to the decision of the particular matter in controversy. Our effort has been to consider what can be regarded as authoritative in the Federal reports in reference to the Constitution and the territory of the United States, and also those parts of the cases which deal at greater or less length with the subject matter of our paper—though they may not be of the authority of exact decision—and from these to discover, as far as possible, not merely the power of the Government over its possessions, but also the fundamental principles which are controlling in deciding the existence or non-existence of such power in the United States Government, believing that in so doing we reach a point from which we can best consider the problems which must arise in the future in reference to the latest acquisitions of the United States.

APPENDIX.

NOTE 1. We have omitted from our discussion the case of *Ex parte Ortiz,* 100 Fed. 955 (1900), because, so far as it bears on our subject, its language is purely dictum, and consequently it has not seemed an important judicial deliverance in regard to the status of the possessions of the United States—especially so, since it is but the opinion of a single judge in a district court. In that case the petitioner (the case arose on a petition for a writ of *habeas corpus*) had been tried by a military tribunal without a jury, but before the ratification of the treaty between Spain and the United States. The court (Judge Lochren) holds that the Government of the United States in the exercise of the war power is justified in so doing. Not stopping here, however, the court enters upon a discussion of the relation of the government to the new territory, and expresses itself as of the opinion that if Congress derives authority to govern such territory from the Constitution, the Constitution *in toto* extends to such possessions. It seems to us this position is at variance with the decision itself. The judge admits that the authority exercised by Congress is a granted power, being derived from the war power, and yet does not hesitate to hold that all the restrictions of the instrument do not bind Congress in the exercise of that power. So it is just as logical to claim that Congress derives its power over acquired territory in time of peace from the Constitution, without being forced to the conclusion that all the restrictions applicable to the legislation of Congress in respect to the States apply to the legislation over acquired territory. The practical necessities in the two cases may vary, but the principles involved are the same. As we have sought to show in the body of our essay, confusion apparently has arisen from considering as one the two questions, viz.: "Have the people granted to Congress power to acquire and govern territory beyond the original borders of the United States?" "Have they restricted that power?"

NOTE 2. We have been unable to secure a report of the decision of the Supreme Court in the late case in which the extradition of Neely was ordered.[1] From press accounts, it seems that the Supreme Court has decided Cuba to be a "foreign country" within the meaning of the language of the extradition act, and "not in any constitutional, legal or international sense a part of the territory of the United States," since such was not the purpose of the war with Spain. While it might be true that between the United States and all foreign nations Cuba was to be treated as conquered territory, yet between the United States and Cuba "that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs." The case apparently leans in the direction of the distinction drawn in the case of *Goetze & Co.* v. *U. S.,* hold-

[1] This case is now reported in 180 U. S. at page 109, under the caption *Neely* v. *Henkel.*

ing that a different point of view must be taken in considering the relation of territory to the United States, when considered from the standpoint of a foreign nation and from our own with reference to our organic law. Of course the questions in regard to Porto Rico and the Philippines arise in reference to territory held not under a declared purpose of ultimate separation from the United States; but the drawing of such a distinction at least furnishes a precedent which may easily be extended. Practically the case seems to recognize the purpose of Congress as the determining factor in deciding whether territory shall be regarded as an integral part of the United States in reference to its organic law. This is the *ratio decidendi* of *Goetze & Co.* v. *U. S.*, and it is hardly too much to say that the *Neely Case* has increased the likelihood of the affirmance of that decision by the Supreme Court.

SUPPLEMENT.

The Insular Tariff Cases.

On May 27, 1901, opinions were delivered by the Supreme Court of the United States in the so-called Insular Tariff Cases. As these were handed down after this essay was submitted to the Faculty of the Law Department of the University of Pennsylvania, it was impossible that they should be discussed in the main body of our essay. Since, however, they bear directly on various points touched upon, and are indirectly indicative of the attitude of that Court upon other parts of our subject, it has seemed worth while to append a discussion of what seems to us to be the results of these decisions, and also of what effect they may have had in modifying or confirming conclusions already formed.

The opinions relate to the tariff imposed on articles of commerce shipped between Porto Rico and the United States, and comprise three classes of duties: first, those imposed before the ratification of the treaty of peace between the United States and Spain; second, those imposed after such treaty under the Dingley Act; third, those imposed still later under the Foraker Act.

As to the first of these classes of duties, the Court is unanimous in holding that there can be no question as to the right of the Executive under the war power to levy and collect them; *Cross* v. *Harrison,* 16 Howard, 182, 1853, is relied on as full authority for this position. (*Dooley* v. *United States,* 21 Sup. Ct. Rep. 762, 181 U. S.—)

As to the second class of duties, those collected under the Dingley Act after the ratification of the treaty of peace referred to, the decision of the Court turns upon the interpretation of the words "foreign country" as used in that act. It is decided by a bare majority of the Court that, upon the ratification of the treaty, Porto Rico ceased to be a foreign country within the terms of the act and hence that duties could not be collected under it on articles shipped between that island and the United States. (*De Lima* v. *Bidwell,* 21 Sup. Ct. Rep. 743, 181 U. S.—)

As to the third class of duties, those collected under the Foraker Act, which prescribed special duties on articles of commerce shipped between Porto Rico and the United States, and which was attacked principally on the ground that it failed to meet the constitutional requirement of uniformity, the Court holds, again by a bare majority, that it is not unconstitutional. (*Downes* v. *Bidwell,* 21 Sup. Ct. Rep. 770, 181 U. S.—)

These are the results of these cases: the conclusion of the first could easily have been anticipated. The second and third furnished opportunities for divergence of opinion strikingly illustrated by the divided attitude of the Court. It is our purpose to study, as far as we may be able, the theories upon which these two cases of *De Lima* v. *Bidwell* and *Downes* v. *Bidwell* proceed, and to glean from them what may be considered as settled thereby, and to discover what advances in this branch of constitutional law have been made by their decision.

The first of these cases decides that after the ratification of the treaty of peace Porto Rico ceased to be a foreign country "within the meaning of the Dingley Tariff Act, which by its terms is intended to fix the duties which 'shall be levied, collected and paid upon all articles imported from foreign countries.' " This is the precise question before the Court, and the decision is as we have indicated; but Mr. Justice Brown, who delivers the opinion of the Court, and with whom concur Chief Justice Fuller and Justices Harlan, Brewer and Peckham, discusses the general proposition of whether or not Porto Rico by the ratification of the treaty of peace became a domestic territory of the United States, and not foreign in any sense. It is impossible to read his opinion without at once noting that the grounds of his decision are based upon broader considerations than a mere interpretation of particular legislative language; and the fact that he considered the question in this light appears conclusively from the first sentence in the second branch of his opinion in *Downes* v. *Bidwell, supra* (at p. 772), where he says: "In the case of *De Lima* v. *Bidwell,* just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and be-

came a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island." To the same effect is Mr. Justice Harlan's summary of the basis of that decision, when he says in his dissenting opinion in *Downes* v. *Bidwell* (at p. 824): "In *De Lima* v. *Bidwell,* just decided, we have held that upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country and became a domestic territory of the United States." This fact is further evident from the dissenting opinion in *De Lima* v. *Bidwell,* where Mr. Justice McKenna, with whom concur Justices White and Shiras, attacks the position of the majority, practically on the theory put forth in *Goetze & Co.* v. *United States* by Judge Townsend,[1] that the "government of the United States has the power to acquire and hold territory without immediately incorporating it."

This attitude of the majority is pointed out in the dissenting opinion in *Dooley* v. *United States,*[2] where it is said (at page 768): "There is a *non sequitur* involved in stating that the question is whether Porto Rico was a foreign country *within the meaning of the tariff laws,* and then discussing, not the question thus stated, but a different subject, that is, whether the territory ceded by the treaty with Spain came under the sovereignty of the United States by the effect of the cession"; for Mr. Justice Brown had defined a foreign country as one "exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States," relying for this definition upon Mr. Chief Justice Marshall and Mr. Justice Story, and citing *The Boat Eliza,* 2 Gall., 4; *Taber* v. *United States,* 1 Story, 1; *The Ship Adventure,* 1 Brock, 235, 241.

Again in *Downes* v. *Bidwell,* Mr. Justice Brown, admitting that Porto Rico became a territory of the United States, holds that the Foraker Act is constitutional on the ground that, in the clause of the Constitution requiring uniformity of taxation throughout the United States, the words "United States" are used in a restrictive sense and do not

[1] V. ante, p. 70 ff.

[2] The dissent is upon a different proposition from that which, as we said just above, was unanimously decided by this case.

include the territories. The justices who concur with him in the result which he reaches do so not because they agree with him in this view, but on reasons which they admit "are different from, if not in conflict with" those expressed by him. The concurring opinion of Mr. Justice White proceeds on the theory of the necessity of incorporation by Congress, thus differing from Mr. Justice Brown, who is compelled to reach his result on some other basis, since he has admitted that by the treaty Porto Rico became a domestic territory of the United States.

The cases from all points of view show unmistakably that the majority of the Court were of the opinion that the ratification of the treaty of peace between Spain and the United States was sufficient to render Porto Rico a domestic territory of the United States.

Interesting results follow from this conclusion. In *Downes* v. *Bidwell,* Mr. Justice Brown finds himself associated with the four justices who dissented from his views in *De Lima* v. *Bidwell.* He "announces the conclusion and judgment of the Court." There is no "opinion of the Court," and none of the concurring justices agrees with the views expressed by Mr. Justice Brown. In fact they antagonize him at various points. He does not believe in the necessity of incorporation; they do. He would restrict the scope of the term "United States" as used in the uniformity clause of the Constitution so as to exclude the territories; Mr. Justice White, with whom concur Mr. Justice Shiras and Mr. Justice McKenna, holds (at p. 789) that "the power just referred to [viz., 'to lay and collect taxes,' etc.] as well as the qualification of uniformity restrains Congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into, and forms a part of, the United States." In this part of Mr. Justice White's opinion the four dissenting judges in *Downes* v. *Bidwell* agreed. It is apparent, therefore, that a majority of the judges of the United States Supreme Court think that Porto Rico is incorporated into the United States, and a majority think that when territory is so incorporated the principle of uniformity should be applied to Federal taxation, and yet in spite of this, and in consequence of the

peculiar division of opinion which occurred, the discriminating duties imposed by the Foraker Act are upheld.

The fact that Mr. Justice Brown "announces the conclusion and judgment of the court" is somewhat significant. No one of the concurring judges agrees with him. No one of them is willing to subscribe to his opinion. Instead, three unite in an opinion which antagonizes his at most points, and finds its principal agreement with it, in its conclusion. It would be natural to expect that this opinion which expressed the view of three judges should have been given the prominence of announcing the "judgment and conclusion of the Court." But it is not unlikely that the opinions are arranged as they are, since the basis upon which these three judges place their opinion was distinctly repudiated by a majority of the Court, concurring in a single opinion in *De Lima* v. *Bidwell*. Mr. Justice Brown's is the only opinion in *Downes* v. *Bidwell* that follows logically the conclusions reached in the preceding case. The concurring opinions delivered are only possible on the theory that these judges completely disregarded the conclusions of the majority in *De Lima* v. *Bidwell*.

It was in view of this that we were anxious to show that the opinion in this latter case proceeded upon a broader basis than would have been absolutely necessary for the decision of the case. This may have been a reason which the concurring judges considered sufficient to justify them in disregarding its theory, but it is a rather striking fact that a majority of judges should concur on two propositions and yet fail of reaching the only conclusion logically flowing therefrom.

In view of this it is not difficult to imagine combinations of circumstances under which the Court would reach conclusions which at first glance would seem apparently at variance with these decisions. Mr. Justice Brown justifies the Foraker Act on an interpretation of the scope of a single phrase of the Constitution, while the other judges proceed upon a discarded theory. If the facts should be such as to separate these judges; if, for example, the clause of the Constitution should be such that it could not be given so restricted an interpretation, or if, supposing such nar-

row interpretation possible, incorporation had occurred, these judges could no longer, except on some other basis, reach similar results. Only under the unusual divergence of opinion which occurred in these cases were the results possible.

We have not as yet referred to the attitude of Mr. Justice Gray. His views are summed up in a very short concurring opinion in the case of *Downes* v. *Bidwell*. He announces his concurrence in substance with the opinion of Mr. Justice White, thus subscribing to the incorporation theory; but there is an intimation in his opinion that he would not support a government by Congress of acquired territory as a *permanent* institution except under the limitations of the Constitution. Thus in speaking of the time required to establish a change of authority in conquered territory, he says (p. 809): "There must, of necessity, be a *transition period.*"[3] And later in his opinion he says (p. 810): "If Congress is not ready to construct a complete government for the conquered territory, it may establish a *temporary*[3] government, which is not subject to all the restrictions of the Constitution." There is an undoubted intimation that he supports the conclusions of the majority more as impressed by the idea of temporary necessity than as heartily indorsing the opinion of Mr. Justice White as a principle of permanent constitutional construction. There is comparatively little to confirm us in this conclusion, and yet the fact that he gives expression to these views, and in particular the fact that he withholds from Mr. Justice White's opinion a simple assent, and prefers to express his concurrence in a separate opinion, seems to us of significance.

Having thus outlined the general character of the decisions, we turn to examine briefly the general theories underlying the views of the various judges. The main difference of opinion arises over the question of the necessity for incorporation into the United States by Act of Congress. It is impossible within the necessarily narrow limits of this discussion to give an exhaustive treatment of the arguments which are advanced on both sides of this

[3] Italics our own.

question. It is this question which divides the Court in *De Lima* v. *Bidwell,* and again to a partial extent in *Downes* v. *Bidwell.* Its thorough consideration by the Supreme Court was therefore imperative, and it is beyond the purpose of this supplement to examine in detail the many considerations which are adduced to support the various sides of this question.

The judges who believe in the necessity for incorporation hold, speaking through Mr. Justice White, that "when the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been mooted" (p. 799). On the other hand the majority judges vigorously oppose this theory, and pertinently ask what degree of legislation is necessary to amount to incorporation. The numerous acts passed for the regulation of Porto Rican affairs, and the government organized for its control are pointed to, and it is urged that it is a quibble to regard incorporation as depending on the simple use by Congress of that word, or the implied assent by Congress to its use in a treaty by legislation recognizing the provisions of the treaty. Mr. Justice Harlan, in concluding his dissent in *Downes* v. *Bidwell* says (at p. 827): "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." And Mr. Chief Justice Fuller, to the same effect, says in somewhat striking language (at p. 820): "The contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions."

More reliance is placed upon legislative and executive construction of the Constitution, than is usual in a constitutional case, and the minority especially rely upon it to sustain their theory of incorporation. It is a significant commentary upon the peculiar theory of government under a written constitution which lies at the basis of our institutions. It is again an illustration of the freedom of construction, which judges regard as necessary in applying an instrument which formulates a system of government "intended to endure for ages, and to be adapted to the various crises of human affairs." Although the past facts of our nation's history, in supporting this theory of incorporation, support a theory which of itself is not sufficient to decide the case, they support a theory which, taken in conjunction with another, leads to a conclusion, felt by many persons to be a necessity under the logic of events which had carried the country to a situation new in its aspect, and critical in its influence.

The second important division in the opinions of the members of the Court is in regard to the scope of the clause of the Constitution requiring uniformity of taxation. Of course, to support the Foraker Act it was necessary that a majority of the members of the Court should have held this clause inapplicable to the case in hand. We do not understand any members of the Court to intimate that Congress is exercising a power not granted by the Constitution. The power to acquire territory and govern it is given by that instrument. The Court divides in its opinion as to whether the limitations of the Constitution were intended to restrict the legislation of Congress in a case circumstanced as the one before it. The majority holds that they were not.

Four of these judges (White, Gray, McKenna and Shiras) proceed, as we have said, on the ground that Porto Rico has not been incorporated into the United States, and that the limitation of the Constitution requiring uniformity of taxation does not apply to territory so situated. Mr. Justice Brown has precluded himself by his opinion in *De Lima* v. *Bidwell* from assenting to such a doctrine, and his opinion proceeds on the theory that though Porto Rico has been incorporated, the uniformity of taxation clause of the

Constitution is intended to apply only to the States,[4] and that therefore it cannot be invoked to affect legislation of the kind before the Court. This argument is met by Mr. Chief Justice Fuller in his dissenting opinion by the following contention:[5] "It is evident that Congress cannot regulate commerce between a territory and the States and other territories in the exercise of the bare power to govern the particular territory, and as this act was framed to operate and does operate on the people of the States, the power to so legislate is apparently rested on the assumption that the right to regulate commerce between the States and Territories comes within the commerce clause by necessary implication. (*Stoutenburgh* v. *Hennick,* 129 U. S. 141.) . . . In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity." This ingenious argument, which appeals to us as of great force, does not directly apply to the question which more immediately concerns us, as to the application of the limitations of the Constitution to the territories uninfluenced by considerations of a contemporaneous effect on the States. But it is followed by an argument drawn from the general theory of our institutions contending against the lodging of unlimited power in any branch of the government.

The prior cases are, of course, fully discussed by both

[4] The opinion of Mr. Justice Brown goes even further than this, for he says, in general, that: "We find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitation of the power of Congress in dealing with them" (p. 786). And again (at p. 779): "That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat. 316, 422), and in *United States* v. *Gratiot* (14 Pet. 526)."

But in this broad position taken by Mr. Justice Brown, and in his interpretation of these authorities, we find none of his associates concurring.

[5] V. p. 813.

sides, and the uncertainty of their conclusions to which we referred in the main body of our essay[6] is referred to. Thus Mr. Justice Brown says, in his opinion in *Downes* v. *Bidwell* (p. 776): "The decisions of this Court upon this subject [*i. e.*, whether there is a difference between the States and territories under the Constitution] have not been altogether harmonious. Some are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States." It is not surprising then, that the same cases are cited on both sides, with almost equal confidence. Thus Mr. Justice McKenna says of the case of *Cross* v. *Harrison* (p. 756): "The curiosity of that case is that all parties cite it, and this court even finds it as convenient and as variously adaptive." This fact, together with the remarkable division of the Court, is confirmatory of our position,[7] that it was impossible to predict with confidence the decision of these cases.

In view of the fact that the prior decisions of the Court are considered in this light by the various justices, it becomes difficult to draw definite conclusions from these decisions, and still more so in view of the extraordinary division of opinion to which we have referred above, and which rendered the present decisions possible. It is interesting to note these different interpretations in a few leading instances, since they bear directly upon questions to which attention has been given in the main body of this essay.

The case of *Loughborough* v. *Blake*, 5 Wheaton, 317, 1820, is on its facts somewhat similar to the case in hand, but the language used in that case by Mr. Chief Justice Marshall[8] is of immediate application, and must be explained in some way by the majority of the judges in *Downes* v. *Bidwell*. Those judges who rely upon the incor-

[6] V. ante, p. 93.
[7] V. ante, p. 98.
[8] V. ante, p. 70.

poration theory have no difficulty in holding that what was said by Mr. Chief Justice Marshall was with reference to incorporated territory, and hence is inapplicable to unincorporated territory such as Porto Rico. Of course, Mr. Justice Brown cannot rely on such an explanation, and he meets the case in a different manner. It is generally agreed in this case, even by the judges who insist on incorporation, that when once Congress has declared the limitations of the Constitution applicable to territory, such limitations cannot subsequently be withdrawn. What is said is largely dictum, but the question was mooted in the argument of the case and may probably be regarded as settled. Upon what theory this is so is not definitely stated. Probably it may be accounted for on the supposition that such act would determine the status of territory, and would be in the same case with an act admitting a new State into the Union, and so would be as much beyond the power of Congress to change as is such latter act. At any rate that constitutional limitations once applied cannot be withdrawn is clearly stated to be the view of the Court. Mr. Justice Brown, working upon this theory points out that the District of Columbia was formed out of territory originally part of States, that hence the uniformity clause had applied to it, and could not be withdrawn, merely by the formation of the District of Columbia under a separate government. In this way the decision of the case is explained and the observations made by the Court, though admitted by Mr. Justice Brown to cause "embarrassment," are claimed to constitute merely a dictum. Mr. Chief Justice Fuller in his dissenting opinion in *Downes* v. *Bidwell* regards this attitude as unjustifiable, saying (at p. 812): "It is wholly inadmissible to reject the *process of reasoning*[9] by which the Chief Justice reached and tested the soundness of his conclusion as merely *obiter*." He likewise points out that the explanation suggested by Mr. Justice Brown finds no support in the opinion of the Court which decided the case. This is by no means the only instance in these cases in which one judge relies on passages in a case which another judge contends are merely dictum.

[9] Italics our own.

Another noteworthy instance is the case of *Fleming* v. *Page,* 9 Howard, 603. Here again we find illustration of the uncertainty of prior judicial opinion upon the questions involved in the case before the Court.

Again, in regard to the Thirteenth Amendment to the Constitution, the peculiarity of whose language we have already referred to,[10] the judges who rely on incorporation as a test, as well as Mr. Justice Brown in upholding his restrictive interpretation of the word "United States" in the uniformity clause, claim that support is given to their theories by the significance of the language of this Amendment in drawing a distinction between the "United States," and a "place subject to their jurisdiction." Thus Mr. Justice White says, in his concurring opinion in *Downes* v. *Bidwell* (p. 806): "Obviously this provision recognized that there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words." Mr. Chief Justice Fuller, answering this argument says, at page 814: "Clearly this prohibition would have operated in the territories if the concluding words had not been added. The history of the times shows that the addition was made in view of the then condition of the country—the amendment passed the House January 31, 1865—and it is moreover otherwise applicable than to the territories. Besides, generally speaking, when words are used simply out of abundant caution the fact carries little weight."

One more instance of the differing way in which the Court meets apparently important considerations in coming to its conclusions, will be referred to. The *Dred Scott Case* was undoubtedly a direct decision to the effect that certain provisions of the Constitution are in force in the territories. All the judges who were members of the Court at the time of that decision admitted it, and it of course lends its support to the contention, that the provision of the Constitution here drawn in question should be enforced in such territory. Thus Mr. Justice Brown says (p. 782): "It must be ad-

[10] V. ante, p. 68 ff.

mitted that this case is a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be taken at its full value it is decisive in his favor." But he adds: "It is sufficient to say that the country did not acquiesce in the opinion, and that the civil war, which shortly thereafter followed, produced such changes in judicial, as well as political sentiment, as to seriously impair the authority of this case." On the other hand Mr. Justice White, who relies on the incorporation test and thus distinguishes the case in hand from the *Dred Scott Case,* holds (at page 788), that with regard to incorporated territory: "Every provision of the Constitution which is applicable to the territories is also controlling therein. To justify a departure from this elementary principle by a criticism of the opinion of Mr. Chief Justice Taney in *Scott* v. *Sandford* (19 How. 393), appears to me to be unwarranted. Whatever may be the view entertained of the correctness of the opinion of the Court in that case, in so far as it interpreted a particular provision of the Constitution concerning slavery and decided that as so construed it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative. That doctrine was concurred in by the dissenting judges, as the following excerpts demonstrate [quoting]."

Striking contrasts are thus exhibited in the interpretation of former decisions and it is difficult to draw conclusions as to what may be regarded as the correct view of the earlier cases. The incorporation test gives the Court freedom in its decision of the problems arising in connection with the new possessions of the government, since it practically places the Court in a position where almost all former authority can be distinguished upon the ground that it applied to incorporated territory. But this test is rejected by the Court in *De Lima* v. *Bidwell.*

On the other hand, so far as we can gather from the cases, Mr. Justice Brown stands alone in the restrictive interpretation which he applies to the uniformity clause, since the judges who concur with him in the result expressly hold that under the same facts they would regard that clause

applicable if the case had arisen with reference to incorporated territory. What is said on the part of these judges, while not precisely outlining the provisions of the Constitution which they would deem applicable, clearly demonstrates that, as to incorporated territory, the Constitution would be regarded by them as applicable in more of its provisions than would follow from the opinion of Mr. Justice Brown. Undoubtedly there remains much land yet to be possessed in this part of the law, and while these decisions have settled some things, even a cursory study cannot but impress one with the unsatisfactory nature of the results, largely due, it seems to us, to the fact that the concurring judges in *Downes* v. *Bidwell* reached their conclusions on such inconsistent grounds.

Upon one point there is a general agreement among the members of the Court. This is as to the applicability of those general restraints upon the legislation of Congress which protect personal and proprietary rights, a point to which reference was made several times in our general treatment of the subject.[11] Thus Mr. Justice Brown says, at page 783, in *Downes* v. *Bidwell*: "To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* Perhaps the same remark may apply to the First Amendment, that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.'" But he adds: "We

[11] V. ante, pp. 97, 98.

do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

To the same effect is the language of Mr. Justice White (at p. 790): "The distinction which exists between the two characters of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject, has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country." And in another part of his opinion he says (p. 791): "The doctrine that those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court in *Chicago, Rock Island, etc., R. R. Co.* v. *McGlinn* (1885), 114 U. S. 542." The dissenting judges in *Downes* v. *Bidwell* of course would hold these provisions as well as other portions of the Constitution restrictive of the action of Congress. Notwithstanding, therefore, the somewhat non-committal language of Mr. Justice Brown quoted above, it seems safe to predict that the guaranties given to personal and proprietary rights by the early amendments to the Constitution will be held restrictive of the legislation of Congress in reference to our latest acquisition. More doubt exists as to whether the customary forms of securing those rights will be regarded as necessarily operative in the new territory.

These cases leave undecided the question of the constitutionality of duties on goods shipped from the United States to Porto Rico. We have already expressed a doubt as to the possibility of allowing this in view of the constitutional provision forbidding a tax on exports of a State.[12] The case of *Dooley* v. *United States* sanctions such a tax under the exercise of the *war power*. We find nothing in these latest cases to lead to the belief that such a tax in time of peace would be constitutional. Even admit-

[12] V. ante, p. 92.

ting the incorporation theory to be correct, it still seems to us that a tax on goods shipped from a State to Porto Rico, would be as much a tax on exports if collected at Porto Rico, as if collected at the port of the State from which they might be shipped, and except upon some highly artificial basis, such tax, we believe, would be held unconstitutional.

We note finally, in concluding this brief discussion of these recent cases, the great weight which was given by the judges who constituted the majority in *Downes* v. *Bidwell,* to arguments drawn from expediency. We do not refer so much to any particular passage, as to the constant tendency to bring into consideration the difficulties which it is conceived would arise from holding the limiting provisions of the Constitution immediately and fully controlling in the territory. Throughout the opinions passages constantly occur, and the statement we have made above is borne out more by the general tone of these opinions than by their precise language. It is not difficult, however, to cite instances which illustrate the nature of the argument which is deemed worthy of serious consideration. Thus Mr. Justice White says (p. 794): "It is insisted, however, conceding the right of the government to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. *This, however, is but to admit the power to acquire and immediately to deny its beneficial existence.*"[13] And again (same page): "To concede to the government of the United States the right to acquire and to strip it of all power to protect the birthright of its own citizens and to provide for the well-being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire."

As further illustrating this feature of the cases, and as indicating considerations which will be regarded as of im-

[13] Italics our own.

portance in the future, we quote, in conclusion, a passage from the last part of the opinion of Mr. Justice Brown in *Downes* v. *Bidwell* (p. 786):

"Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. Choice, in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien[14] races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

[14] V. ante, p. 98.